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REPORTS OF CASES  
DECIDED IN  
**THE SUPREME COURT**  
OF THE  
STATE OF UTAH

HARMEL L. PRATT  
REPORTER.

VOLUME XLVI.

January, 1915, to August, 1915.

CHICAGO  
CALLAGHAN AND COMPANY,  
1916



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**IN THE MATTER OF THE REPORT OF THE COMMITTEE APPOINTED TO DRAFT RESOLUTIONS ON THE DEATH OF HON. O. W. POWERS, A FORMER JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF UTAH.**

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“The committee heretofore appointed to draft resolutions on the death of Hon. O. W. Powers, a former justice of the Supreme Court of the Territory of Utah, present their report as follows:

“Hon. Orlando W. Powers, once a member of the Supreme Court of the Territory of Utah, was born at Putneyville, Wayne County, New York, on June 16, 1851.

“Judge Powers graduated from the law department of the University of Michigan in 1871, and soon thereafter entered the practice of law in Kalamazoo, Michigan. In 1876 he was elected city attorney of Kalamazoo, serving one term, and was again elected to that position in 1885. While practicing in Michigan, he wrote and had published two text books, one entitled ‘Chancery Practice and Pleading,’ the other, ‘Powers’ Practice,’ both relating to practice and procedure in the courts of the State of Michigan. In 1885 he was by President Cleveland appointed associate justice of the then Supreme Court of the Territory of Utah, but resigned from that position very shortly thereafter and returned to Michigan. During his short stay in Utah, however, he became imbued with the possibilities of this state and in 1887 returned to Salt Lake City, where he entered upon the practice of his profession. Here he made his home up to the time of his demise. He soon earned a reputation in this state as an unusually bright and eloquent speaker and brilliant advocate, and soon took rank as one of the ablest lawyers in the intermountain region in the criminal branch of the law. He was several times called to other states of the Union to participate in celebrated trials, the most noted of which,

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probably, was the trial of Mrs. Anna W. Bradley, who was accused of the murder of former United States Senator Arthur Brown, of Salt Lake City. The case was tried in Washington, D. C. Judge Powers' defense of Mrs. Bradley, which resulted in a verdict of not guilty, attracted comment throughout the United States.

"Judge Powers was from the time of his admission to the bar up to the time of his death always active in politics and civic matters, and invariably took a decided position on one side or the other of public questions. He was considered to be one of the best of political speakers during his day, and traveled through many states advocating the principles and urging the election of the candidates of his chosen party.

"He had a keen and brilliant mind, a quick wit, a fund of knowledge, and a wealth of language which enabled him to take rank in the eyes of the public as one of the foremost lawyers of this state. He had a varied practice, but it was in the criminal branch of the law that he earned the widest reputation. Some of his addresses in the trial of criminal cases contain gems of oratory and attracted wide-spread attention.

"Judge Powers was admitted to practice in the Supreme Court of the United (States) in 1875. He was a member of the American Bar Association. He leaves a son, Roger W. Powers, who has chosen his father's profession, and is now practicing in Los Angeles, California, and Salt Lake City. For fifteen years Judge Powers was a partner of Hon. D. N. Straup, now associate justice of this court, and that firm long enjoyed the distinction of being one of the leading firms of the State of Utah.

"Judge Powers died at Salt Lake City on January 2, 1914, at the age of sixty-three. His reputation as a splendid lawyer, brilliant advocate, eloquent speaker, and sterling citizen will live for many years to come.

"In token of his attainments, and the services he rendered the people of this state, and of the high regard in which Judge Powers was held by his brother attorneys, we recommend that this report be spread upon the minutes of the Supreme Court of the State of Utah, and printed in the next bound volume of the Utah reports, and that the clerk of this

court be directed to furnish his widow and family with a copy hereof.

“Respectfully submitted,

CHAS. S. ZANE,  
W. H. DICKSON,  
OGDEN HILES,  
SAMUEL R. THURMAN,  
A. J. WEBER,  
T. D. JOHNSON,  
HERBERT R. MACMILLAN,  
*Committee.”*

The court accepting and adopting said report it is ordered that the same be spread upon the minutes of this court; that a copy thereof be transmitted to the widow and family of the deceased, and that the same be printed in the next bound volume of the Utah reports.



REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
STATE OF UTAH

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*(Continued from Volume 45)*

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CAMPBELL v. ZION'S CO-OP. HOME BUILDING &  
REAL ESTATE CO. (and eight other cases).

No. 2626-2634. Decided December 12, 1914 (148 Pac. 401).

1. CORPORATIONS—STOCK SUBSCRIPTION—RESCISSION. In order to rescind a stock subscription, plaintiff must show that defendant has made a false representation in regard to a material fact not actually believed, on reasonable grounds, to be true, with intent that it should be acted upon, and that it was acted upon by plaintiff to his damage, while ignorant of the falsity thereof. (Page 13.)
2. FRAUD—STOCK SUBSCRIPTIONS—REPRESENTATIONS. Statements by officers of a corporation to purchasers of its treasury stock that they would get handsome returns, that the stock would double in value, and that they would not lose, and similar assurances, being mere opinions and beliefs, are not actionable *per se*, although untrue. (Page 14.)
3. CORPORATIONS—STOCK SUBSCRIPTIONS—REPRESENTATIONS. Statements by officers of a corporation, to induce subscribers to purchase stock, that the corporation was able to pay dividends out of its present holdings and property from the very start, and that dividends already paid had been earned and were justified, that the company guaranteed to pay a stated percentage of profit for a certain number of years, shown to be false, and made with intent to deceive, were ground for rescission of subscriptions made in reliance thereon. (Page 14.)
4. CORPORATIONS—STOCK SUBSCRIPTIONS—REPRESENTATIONS. False statements, made in bad faith by officers of a corporation to induce subscriptions to treasury stock, that the company then



Campbell v. Zion's Co-op. H. B. & R. E. Co. (8 other cases), 46 Utah 1.

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had sufficient assets with which to pay dividends from the start and to continue to pay them for a certain number of years without impairing the financial ability of the company, regardless of future earnings, constituted a sufficient ground for rescission of subscriptions made in reliance thereon, notwithstanding that dividends unearned and not paid out of the surplus proceeds were in fact received by the subscribers. (Page 16.)

Appeal from District Court; Second District; *Hon. J. A. Howell*, Judge.

Separate actions by A. M. Campbell, by Fred King, by P. B. Haslet, by George King, by Fred W. Voll, by Fred Breining, by B. F. Estes, by W. B. Haymond, and by B. F. Rugg against the Zion's Co-operative Home Building & Real Estate Company.

Judgment for plaintiff in each case. Defendant appeals.

**AFFIRMED**, with directions.

*A. A. Duncan* for appellant.

*A. G. Horn* and *Thos. Marioneaux* for respondents.

**STRAUP, J.**

These are actions to recover moneys from the defendant paid by the plaintiffs in the purchase of its capital stock. They are based on a rescission of contract for alleged deceit, misrepresentations, and fraud. There are nine cases—different plaintiffs, same defendant. The transactions and controversies arising out of them are similar. The cases were tried separately to the court. In each the plaintiff had judgment for the full demand of the complaint. The defendant appeals in each with separate transcripts and abstracts of the records. The cases were here argued and submitted together on briefs filed in the Campbell case and stipulated to apply to all of the cases.

The chief contention of the defendant is that the findings are not supported by the evidence, and that neither the state-

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Appeal from Second District.

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ments or representations as found, nor as shown by the evidence, are of such material and existing or past facts or events as to be actionable; that they relate to mere expressions of opinion and beliefs, and to future events and promises. The facts were found as alleged in the complaints.

The defendant was organized on the 26th of August, 1908, to do a general real estate business, buy and sell real estate, commercial stocks, and all kinds of merchandise used in the construction of buildings, and to carry on a general contracting and building business. Its capital stock was 250,000 shares of the par value of one dollar each, of which 80,420 shares were subscribed for and issued, and were fully paid at par. The balance of the stock was held as treasury stock, to be disposed of by the board of directors. The defendant owned considerable improved real estate, and had and operated two lumber yards at Salt Lake, and later, in 1911, established one at Ogden. In August, 1909, the Bear Creek Land Company was organized with a capital stock of 200,000 shares of the par value of one dollar each and acquired timber lands and mills in Oregon. The defendant, shortly thereafter, purchased 40,000 of 84,500 issued shares of that company and paid therefor \$40,000. On December 31, 1908, the defendant declared and paid its first dividend of \$8,979.75; on February 23, 1909, a stock dividend of \$50,000; and on December 30th a cash dividend of \$32,265, which was paid January 1, 1910; and between February and December paid additional cash dividends. The total dividends declared and paid for the year 1909 were about \$110,000. In 1910 it paid a cash dividend of about \$35,000, in 1911, \$14,185, and in 1912, about \$6,000, mostly on preferred stock. In May, 1912, the defendant's net assets, as shown by its books and as testified to by its president, were \$219,213.40. This, however, is claimed to have been exaggerated by adding pretended increased cost prices of material and market values of real estate. Its total issued stock then was 265,633 shares; its capital stock having been increased in the meantime to 500,000 shares, of which 150,000 were preferred shares. Every stockholder was given the privilege of converting common stock for preferred stock. All the stock purchased by the plaintiffs was common stock.

Campbell v. Zion's Co-op. H. B. & R. E. Co. (8 other cases), 46 Utah 1.

Some of them, after their purchase, exchanged some common for preferred stock. The lumber yard at Ogden and the milling and lumber business in Oregon were operated at a loss.

It is alleged in the complaints, and admitted by the defendant, that on the 23d day of October, 1908, about two months after the defendant was organized, it authorized and empowered its president and secretary "to find purchasers for and negotiate the sale of and sell its treasury stock at the price and sum of one dollar per share." About that time the defendant put out a printed circular in which it stated:

"The directors of the company have set aside 50,000 shares of the capital stock of the company, amounting to \$50,000, to provide for additional working capital. Said stock will be sold at par, and the directors assure the investing public that they will secure the stock at the same price as they have paid for their interests in the company. \* \* \* If you desire to invest your money safely and at the same time get handsome returns from same, we would respectfully call your attention to the above opportunity. Remember that many of the greatest fortunes have been made along the lines we will follow out. Therefore you can readily see that you cannot possibly put your money in anything that will be so safe and at the same time productive of such handsome returns on your capital. The company will be able to pay dividends from the very start, and we can recommend the stock as a first-class investment that will improve as time advances. Our company is not experimenting on anything that has not been proven a success, and, if we can approximate the success that other similar companies have made in other cities, we are safe in saying that all our stockholders will be delighted with the returns from their investment. \* \* \* We claim further that through having the combination of a large capital and experienced men handling same, and practically never owing one cent to any one, we can consistently guarantee to all investors that they cannot lose one cent and will receive dividends from the very start either payable quarterly or semi-annually in cash. Any excess over the cash dividend will be carried to surplus or distributed in stock dividends."

Copies were received by all of the plaintiffs before they

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Appeal from Second District.

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purchased any stock. All of them testified that they, for a long time, had been well acquainted with the secretary and had the utmost confidence in him. They were all railroad employees. Formerly the secretary was also for a number of years in the employ of the same railroad company. All of the plaintiffs were solicited by the secretary, some of them by both the president and the secretary, to purchase the defendant's treasury stock.

In the Campbell case the evidence with respect to additional statements and representations made to Campbell by the secretary and president, and as testified to by Campbell, is: The secretary talked with him about purchasing stock several months before he purchased his first stock, which was 400 shares, February 6, 1909. The secretary said to him:

"I consider you one of my best friends, and I would like you to get all you can as quick as possible."

He told him who the directors and officers of the defendant were, their business experiences and connections, and stated:

"We own our own real estate; own buildings all rented as fast as we can get them completed. We own our own lumber yard and our own timber. We are doing an elegant business, and all the money you can get I would advise you to put into this company. It is worth a dollar a share, and we expect it to go to two dollars right away. Why save your money in the bank at four per cent.? We can guarantee eight. \* \*

\* I could guarantee it as a gilt-edge investment. It is no speculation. It is founded on a standard, reliable company. You can't lose one cent. \* \* \* In from three to five years (if he purchased 5,000 shares) you will be independent, as everything is prosperous, and we are expecting to open up timber lands and sawmills in Oregon. \* \* \* We guarantee eight per cent. for the next three years, and maybe more. It may be twenty-eight per cent. the way business looks now."

He further testified that the secretary assured him that he was taking no chances whatever, and that he was buying into the best thing that ever was sold; that the stock was good, dollar for dollar, at any bank in Salt Lake, and he or the defendant would give him dollar for dollar for his stock. After

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Campbell v. Zion's Co-op. H. B. & R. E. Co. (8 other cases), 46 Utah 1.

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the witness had purchased the first stock, he had a further talk with the secretary in which he told him that the defendant owned its own timber lands, its own sawmills, and was shipping its own lumber, and had a market not dependent upon the Salt Lake market. He also thereafter had a talk with the president. He told him that:

"It is the finest investment you ever got into. I want to make you working boys some money."

He told him that the company was financially in first-class circumstances, did not owe a dollar, and that it paid cash for everything it bought, and that it guaranteed eight per cent., and maybe more, and that "if you get 5,000 shares we guarantee that in five years you will be an independent man; that you won't have to work for a railroad company or any other company"; that the company was financially reliable and guaranteed dividends on all outstanding stock, and that there was no chance to lose a cent, and that the dividends would come regularly at eight per cent.; that the property was paying a good income; that the company had enough money coming from its property to guarantee the dividends it was paying; that the company had made the money that paid the dividends; and that they could be looked for regularly. He asked the witness if he had received the \$100 dividend, the ten per cent. cash dividend (paid January 1, 1910), and stated that he could guarantee those dividends; that the company had made the money that paid the ten per cent. dividend, and that they could be looked for regularly; and that the money also had been earned that paid the stock dividend. The witness thereafter, on the 15th of January, 1910, purchased 1,400 additional shares, and on the 21st of March, 1910, 2,500 shares more. He, as well as all the other plaintiffs, paid a dollar a share for all stock purchased by them. He in 1909 was paid \$50 in dividends; in 1910, \$278.31, of which \$100 was paid January 1, 1910; in 1911, \$339.31. The court awarded him judgment for all the moneys paid by him, together with interest thereon, less the dividends received by him, with interest—a judgment of \$4,767.50.

In the Rugg case the evidence with respect to additional statements and representations is: The secretary, after tell-

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Appeal from Second District.

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ing him who constituted the directors and officers of the company, stated:

"That they were ready to do business and would pay dividends right on the start, and that they guaranteed eight per cent. interest "on his money. \* \* \* You can't miss it, Ben. It is the finest thing we have ever had a chance to get into. \* \* \* We guarantee to pay you eight per cent. What is the use of leaving your money in the bank at four per cent. when we guarantee to pay eight per cent.? \* \* \* We have all kinds of real estate in Salt Lake. You know the profit in lumber. \* \* \* We have property and lumber in our yard that, if we don't do anything else or go into anything else, we can pay eight per cent. dividend from three to five years."

Rugg, on November 7, 1908, purchased 200 shares, and on the 27th of that month 1,000 shares, in June, 1909, 1,000 shares, and in November of that year 200 shares. The secretary thereafter urged him to buy more, and said:

"We have got an enormous thing. If I should tell you all that we have got, you could hardly believe me. \* \* \* I would advise you to buy all the stock you can in our company. It is a sure and safe investment."

In the fall of 1909 he stated to him that they had timber lands and sawmills in Oregon, and that the profit from that land would pay the interest on the money that the stockholders had invested in the company. Later he called his attention to the "big dividend paid the first part of the year 1910," and asked him if he had received it. The witness replied that he had. The secretary stated:

"You will have them right along. \* \* \* The company is all right. It is getting better all the time. We are not thoroughly started yet. We are going to open branches around the country. We don't want to let it get out. You get all the stock you can."

The witness, between January 15 and October 27, 1910, purchased 1,800 additional shares. The dividends paid him in 1909 were \$167.80; in 1910, \$443.33, of which \$278 were paid January 1, 1910; in 1911, \$121.31; and in 1912, \$170.57. He was given judgment for \$4,452.59.

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In the Fred King case, the plaintiff testified that the secretary advised him to go into the company, and said it was a good thing, and wanted him to invest his money; that they had a good man at the head of the business, and that it was the best proposition that he ever would get into, and that they would pay right on the start eight per cent. dividends or more; that they would guarantee that much, and that they would pay eight per cent. dividends right along for the next three or five years; that they could do this because they had a good business and a couple of lumber yards, and that, if he purchased 5,000 shares, he would be independent for life; that, if he purchased stock and "got cramped" and wanted money, the company would buy it back at par; that it was worth a dollar a share and always would be worth that much or more. He further said:

"I tell you it is a big thing. After we get started we don't know where it will end. It is going to be one of the biggest companies in the state."

He further said that he was fixed so that he could pay dividends right on the start; would guarantee eight per cent. On the 23d day of October, 1908, the witness purchased 2,000 shares, and in the latter part of December of that year an additional 1,000 shares. He thereafter had a conversation also with the president, who told him that "we can guarantee eight per cent., and maybe more." He later had a further conversation with the secretary, in which he stated that they were going into the lumber business up north, and that it would be one of the biggest things in the country; that they would make lots of money out of timber lands; and that they could not use it all in 20 years. He asked the witness how he liked his dividends, and stated:

"You will get them right along. The company is earning money. You will get the dividends right along."

He again stated that they would guarantee eight per cent., and stated that they were making that on the lumber, house rents, and buying and selling real estate, and out of timber lands. In another conversation the witness' attention was again called to the dividends, and was asked: "What do you think of the big dividend?" The witness replied: "That is

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all right." The secretary answered: "We earned them, and we are going to continue to earn them." The witness, in June, 1909, purchased 1,175 additional shares, and on the 1st of October, 1910, 4,000 shares more. The dividends paid him in 1909 were \$366.50; in 1910, \$864.72, of which \$500 was paid January 1, 1910; in 1911, \$213.06; and in 1912, \$22.06. He was given judgment for \$9,099.75.

George King, before he purchased stock, had a conversation with the secretary in which he told him they had lumber yards in Salt Lake City, real estate, were going to build houses, buy and sell real estate, and would pay dividends right on the start, and advised him "to get into it." He told him that if he got 5,000 shares he would be independently rich from the dividends that the company would pay and was able to pay. He told him that the business was an enormous thing, and that he wanted all of his friends to get into it. He stated that their assets were such that they could pay dividends right on the start, and that they would guarantee eight per cent., and that they were able to pay eight per cent. interest from three to five years without hurting the company's financial standing; that the resources and earnings from what they had would be eight per cent. from three to five years; and that at any time he got "cramped, bring your stock down and we will redeem it and give you dollar for dollar." The witness purchased 1,000 shares on the 30th of December, 1908; in December, 1909, 725 shares; and in January, 1910, 1,000 shares. After his second purchase the secretary told him that the company had acquired timber lands in Oregon, had sawmills, and was shipping lumber. He called his attention to the dividends which had been paid. The witness asked him if the company could afford to pay the dividends, and if they could keep them up. The secretary replied:

"Well, if we didn't earn it we couldn't pay it. If it is doing it now, why won't it do it from then on? No reason in the world."

At another time the secretary asked him if he was satisfied with his dividends. The witness said that they were all right, and asked:



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"Are you still going to keep on paying these big dividends?"

The secretary replied:

"You bet you. We have got the stuff right with us to pay it. \* \* \* That the company was able to pay them from the earnings of the company."

The president told him the same thing. The dividends paid him in 1909 were \$135.50; in 1910, \$321.58, of which \$200 was paid January 1, 1910; in 1911, \$71.04. He was given judgment for \$2,967.42.

Haslet purchased 2,000 shares on the 20th of January, 1910. He was solicited a number of times before he purchased his stock. Similar statements were made to him as were made to the other plaintiffs. Just before he purchased the stock, the secretary told him that he was sorry that he had stayed out so long, and called his attention to the dividends King and Campbell had received, and stated that they guaranteed eight per cent. dividends from three to five years and agreed to take back the stock at par at any time. In response to an inquiry of the "big dividend," the secretary answered:

"You needn't argue to me that we can't pay dividends like that because we did, and our earnings justified it, and we paid them without any detriment to the company. If we can do that, why can't we guarantee eight per cent.?"

He further stated that:

"The profits are something enormous. \* \* \* It is the last chance you will ever get to buy any stock. You have kept out too long now. We have only got a little batch of treasury stock left for sale."

He further stated that the payment of these "big dividends in 1909 didn't impair the standing of the company whatever." He was given judgment for the \$2,000, with interest, less the dividends received by him, \$2,466.70.

Estes purchased 2,500 shares on the 18th of February, 1910. He also had similar conversations with the secretary and president as testified to by the other plaintiffs. In January, just before he purchased his stock, the secretary told him that he missed it "by not getting in; that he missed the big dividend that was paid January 1st; and that Fred King

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got \$500." The president told him that they had thirty-five houses in Salt Lake City, and a lumber yard, and that they were able to pay dividends on their stock from the property they owned in Salt Lake, and that they could guarantee eight per cent. He was given judgment for \$2,837.87.

Breining, in August, 1908, had a conversation with the secretary in which he told him that the company would pay eight per cent.; that the stock would always be par, and that he always could get his money back, and that the purchase of 5,000 shares would make him independently rich; and that the company had "a certain amount of real estate," and would commence to pay dividends right away. In September, 1908, he purchased one hundred shares. He had a further conversation with the secretary in which the secretary asked him what he thought of the big dividend of February 23 (1909). He replied, "all right;" and asked, "How are you folks paying that?" The secretary answered:

"Why, that is nothing to what we will do. We haven't started yet. We must have earned it or we wouldn't be able to pay it."

In April, 1909, the witness purchased 173 additional shares and in May of that year 200 shares more. He was given judgment for \$518.35.

Voll purchased 1,000 shares on the 15th of December, 1908. At several times he had conversations with both the secretary and the president before he purchased his stock. They told him:

"This is going to be a mighty good thing, Fred. You had better invest some money."

They called his attention to the fact that the company had fourteen houses, some under construction; that they would average in value probably \$3,500 each, and would rent for thirty dollars to forty dollars each; and that the income from that would more than pay the dividends they expected to pay on the stock. About two weeks later they urged him to buy stock, and stated that they were going to pay a dividend early in January, 1909, and that, if he would invest, he could participate in the first dividend; that they would guarantee eight per cent., and probably more, and told him that if,

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at any time, he felt dissatisfied with his stock, or needed any money, they would take it back at par; that the stock would increase in value; that it would double in value inside of a year or eighteen months, and that, if he purchased 5,000 shares, it would not be necessary for him to work any longer; that "he could sit around and take it easy," and that "this is the biggest thing I ever knew in my life." He also had a conversation with the president, and "he assured me that he thought it was a mighty fine proposition and a good thing to put a little money in, and advised me to buy 5,000 shares." The witness was given judgment for \$1,014.49.

Haymond purchased 500 shares on the 27th of October, 1908. He testified that the secretary told him that:

"We have got considerable property in Salt Lake and got a lumber yard, and they are running good. We are doing a good business in the lumber yard, and we are selling stock at the rate of a dollar a share. I want to get some of you fellows that I know well in on this and make you a little money. \* \* \* The first dividend will be paid the first of the year. Get right in now and get in on the first dividend. It is going to be a big thing. It is gilt-edge. \* \* \* If you get 5,000 shares in this company, inside of a few years you will be independent. You won't have to work for these damn railroad companies any more."

The president told him of their lumber yards; that the business was flourishing; that he had been in the lumber business for twenty years and made lots of money; that they guaranteed eight per cent. dividends; on one occasion that "we have got an income now if we don't make another cent from three to five years we can guarantee we will pay eight per cent. on every dollar that you invest in this company"; and on another "that they had the property and could pay dividends," and that "we have got money enough now, if the company never earns another cent, from our lumber and real estate that we can guarantee you that we will pay you eight per cent. dividend." He told him that he was foolish to leave his money in the bank at four when he could get eight per cent., and that it would be a good business proposition to borrow money at seven per cent. to buy stock, and that at

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any time he desired to sell his stock they would buy it back at par. Haymond was given judgment for \$514.69.

There is much of this which, standing by itself, would not be actionable. The law applicable to the subject in hand is well settled and is well stated in *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 1 881, 31 L. Ed. 678, as follows:

"In order to establish a charge of this character the complainant must show by clear and decisive proof: First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. The first of the foregoing requisites excludes such statements as consist merely in the expression of opinion or judgment, honestly entertained; and again (excepting in peculiar cases) it excludes statements by the owner and vendor of property in respect to its value."

Also in 14 A. & E. Ency. L. p. 34, and 20 Cyc. pp. 17, 20.

The statements that the defendant had a capital stock of 250,000 shares, of which 80,400 had been issued and were fully paid at par, that it had 50,000 shares in the treasury as treasury stock, that the directors and subscribers of the 80,400 shares had paid par value, the same price paid by the plaintiffs, and that the defendant had considerable real estate and two lumber yards in Salt Lake and was there doing a real estate and lumber business, were not shown to be false. The books of the defendant showed, and its president testified, that its business at Salt Lake for 1908 and 1909 was profitable, but "fell off" in 1910, due to business depressions and to financial and market conditions beyond the defendant's control. That the business, profits, and earnings, however, were such as to justify the dividends paid, and the statements made respecting them, is another thing which presently will be considered. The statements that the lumber and milling business in Oregon was profitable are shown to be false.

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The statements that investors will "get handsome returns," that their "investments will be safe," that "fortunes had been made in the same line," that "the stock was worth a dollar a share and would double in value," that purchasers "could not lose, took no chance," that if they "were dissatisfied with their stock the company would buy it back at par," and statements concerning the mere worth or value of the defendant's holdings or assets, 2 future costs and expenses of operation, future profits to be derived from the business, or from the purchase of stocks, or other investments, the future ability of the defendant to pay dividends, and other similar expressions and statements, that "the purchase of 5,000 shares would make the purchaser independent for life, would not have to work any more," that "this is the biggest thing I ever knew in my life, the biggest in the state, the best thing ever sold, a mighty good thing," and other similar statements and expressions, are mere opinions, beliefs, future promises, assurances, or happenings, or "trade talk" and "puffings," and not, in themselves, actionable. *Swan v. Mathre*, 103 Iowa, 261, 72 N. W. 522; *Croker v. Manley*, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196; *Buena Vista Co. v. Billmeyer*, 48 W. Va. 382, 37 S. E. 583; *Riley v. Treanor* (Tex. Civ. App.) 25 S. W. 1054; *Milwaukee Brick & Cement Co. v. Schoknecht* 108 Wis. 457, 84 N. W. 838; *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623; *Meyers v. Alpena L. & B. Ass'n*, 117 Mich. 389, 75 N. W. 944; *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179; *Getchel v. Dusenberry*, 145 Mich. 197, 108 N. W. 723; *Commonwealth v. Mechanics' Mutual Fire Ins. Co.*, 120 Mass. 495; *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178; *Martin v. Eagle Creek Dev. Co.*, 41 Or. 448, 69 Pac. 216; *Weston v. Columbus Ry. Co.*, 90 Ga. 289, 15 S. E. 773.

As we view the case, about all the actionable statements are those relating to the defendant's ability, out of present holdings, property, moneys, or earnings, to pay dividends "from the very start," guaranteeing the purchasers that the defendant had present ability to pay dividends, not only in the future, but "from the very 3

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start," and those that the dividends declared and paid were earned and justified, and that profits were derived from the defendant's lumber and milling business in Oregon. The defendant, in its circular, stated that:

"The company will be able to pay dividends from the very start. \* \* \* We can consistently guarantee to all investors that they \* \* \* will receive dividends from the very start, payable quarterly or semiannually in cash."

Its president and secretary, expressly authorized to sell the stock, stated that the defendant guaranteed to pay eight per cent. for from three to five years; that it had property, assets, and money to justify the payment of such dividends without "hurting the company's financial standing," and though "the company never earns another cent"; and that the dividends which were declared and paid were earned and justified. These, among others, the court found were false and were made in bad faith and to deceive. The defendant, in the year 1909, one year after its organization, declared and paid a stock dividend of \$50,000, a cash dividend of about \$60,000, \$32,000 of which was paid at one time, a total dividend for that year of about \$110,000, an excess of dividends over earnings for that year of about \$64,000. In 1910 it paid a cash dividend of about \$35,000, which also was in excess of the earnings for that year. We find nothing in the record to justify these dividends or the statements made concerning them. The defendant declaring and paying them held out to the "investing public" that they had been earned, were paid out of surplus profits or net earnings, and were justified. That was not true. But the president and secretary stated and gave assurances that they had been earned and were justified. In selling stock much was made of "the big" dividends. The plaintiffs testified that they believed the statements, and that they relied upon them. Most of the purchases were made after the large stock dividend of \$50,000 had been declared and paid. Some of the plaintiffs mortgaged their homes to raise money with which to purchase stock. They further testified that they had no knowledge that the dividends had not been earned until shortly before these actions were commenced, when they had

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the defendant's books inspected and examined by an expert accountant. Declaring and paying dividends, not out of surplus profits or net earnings, is an act which in and of itself is fraudulent, fraught with false representations, and calculated to deceive. Such representations, and the statements made by the defendant's president and secretary that the dividends had been earned and were justified, relate to material and existing or past facts. That all of the plaintiffs who thereafter purchased stock were influenced and deceived by such representations and statements cannot, on the record, be doubted. The court found that the defendant and its president and secretary, in such particular, acted in bad faith and with knowledge that the dividends had not been earned. We think the findings as to that are justified, and that all of the plaintiffs who purchased stock after the first large dividend of \$50,000 was declared and paid are clearly entitled to recover.

Now, as to those who purchased stock prior thereto. The court found that the assets and earnings of the defendant were not such, at any time, as to justify the payment of dividends, at least not to the extent declared and paid. The dividends paid from August, 1908, when the defendant was organized, to December of that year, were about \$9,000. There is evidence to show that they were about \$3,000 4 in excess of surplus profits. To the contrary there is evidence to show that the net earnings of the defendant for that year, including about \$2,700 gain price of merchandise, were about that large. It, however, does not follow from that, nor does the record otherwise disclose, that the defendant, for that reason, was justified in paying them out as dividends. But the most important statements to these plaintiffs are those that the defendant had on hand sufficient money, property, or assets with which to pay eight per cent. dividends from the start, and from three to five years, without "hurting the financial standing of the company," and though "it did not earn another cent," and those guaranteeing a present ability to pay dividends. These, the court found, were also false, and that they were made in bad faith. The finding is assailed because the plaintiffs, as is asserted,

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in fact received dividends to an amount equivalent to an eight per cent. dividend for from three to five years. There is nothing to that, because they were not entitled to them, not having been earned and not paid out of surplus profits or net earnings. On the record, we do not find anything to justify even the statements made to the plaintiffs purchasing stock prior to the "big dividends." Some of them, in a sense, may be said to be statements or expressions of opinions or beliefs. Generally speaking, it may be conceded, and we do not depart from it, that statements or expressions concerning a mere worth or value of the defendant's holdings or assets, future costs and expenses of operation, profits to be derived from the business, or purchase of stocks, or other investments, that the defendant in the future will be able to pay dividends, that stockholders or other investors will derive great, or any, profits, and other similar expressions or mere opinions or beliefs, are not, in themselves, actionable. But the effect of the statements here is that the defendant then had property, assets, and moneys with which to pay dividends "from the very start," and to continue to pay them, for from three to five years, without impairing the financial ability of the company, and regardless of future earnings or other sources of income. That was not true nor justified. These, if they are not statements of material and existing facts, certainly come within the rule of actionable false statements of opinions, if, as found by the court, they were made in bad faith and to one entitled to rely upon them, and, as stated by Mr. Justice Henshaw, in the case of *Phelps v. Grady*, (Cal.) 141 Pac. 926:

"True, of course, it is that expressions of opinion honestly made are not actionable. Equity has no concern with them. But equally true it is that a false statement of an opinion or a false opinion expressed to one entitled to rely upon it may form the basis of an action for deceit, like any other misrepresentation of fact"—citing cases.

The court found there was nothing to justify them; that they were false; that they were made in bad faith, and to in-



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fluence, mislead, and deceive the plaintiffs; that they had the right to rely, and did rely, upon them, and, because of them, were deceived and induced to purchase stock and were injured. The court, upon the evidence, further deduced the conclusion that the statements made to those who purchased stock in 1908, and the action of the defendant paying and declaring dividends grossly in excess of surplus profits, and the statements made by its president and secretary with respect to them, were but parts of a fraudulent transaction or scheme to create a false market for, and a false value of, the defendant's capital stock. It is unnecessary to the decision to go to that extent. It is enough to hold, as we do, that there is sufficient evidence to show that the statements were not justified; that they, as found by the court, were not honestly made, nor true; that they came from those who presumably had and claimed to have personal knowledge of the facts declared; that those to whom they were made were entitled to rely, and did rely, upon them; and that they were influenced, deceived, and injured by them. As to whether the statements were made dishonestly, or in bad faith, or with an intent to deceive, is, on the record, open to controversy. As to that, the evidence is in conflict. Much can be said in support of either theory. So, is there a conflict in the evidence as to whether some of the statements testified to by the plaintiffs were made or not? Some of them testified to as having been made by the president are denied by him. Those testified to as having been made by the secretary are not denied. What the ultimate facts in this respect may be is largely dependent upon the credibility of the witnesses, the weight to be given their testimony, and motives of the parties. The trial court, with the witnesses before him, had better means and opportunity than we have to get at the real truth. So, adopting the findings, we, on the record, think they and the conclusions in the particulars indicated are supported by good and sufficient evidence, and that hence the judgments should be affirmed; the plaintiffs, and each of them, as tendered by them, and as decreed by the court, to surrender the certificates of stock so purchased by them on payment or satisfaction of the respective judgments.

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Such is the order. Let it be made in each case. Costs to the respondents.

McCARTY, C. J., and FRICK, J., concur.

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STATE v. MACMILLAN

No. 2637. Decided January 27, 1915. (145 Pac. 833.)

1. **INDICTMENT AND INFORMATION — STATUTORY OFFENSES — INDICTMENT IN LANGUAGE OF STATUTE—"INDECENT ASSAULT"—"INDECENT LIBERTIES."** An indictment in the language of Laws 1909, chapter 26, declaring that every person who shall assault a child under the age of 14 years, and shall take indecent liberties with or on the person of such child, without committing, intending, or attempting to commit the crime of rape or assault with intent to rape, shall be guilty of an indecent assault, is sufficient without alleging in what manner and under what circumstances accused took indecent liberties with the person of prosecutrix, for the crime is in its legal import an indecent assault, and the terms "indecent assault" and "indecent liberties" are convertible, and the term "indecent liberties" is self-defining, and the term "indecent assault" is but the statutory definition epitomized.<sup>1</sup> (Page 21.)
2. **CRIMINAL LAW—WITNESSES—COMPETENCY OF CHILD.** The competency of a child to testify is within the discretion of the trial court, and its decision will not be disturbed, unless clearly abused. (Page 22.)
3. **WITNESSES — COMPETENCY — DISCRETION OF COURT.** On a trial for taking indecent liberties with a child, between seven and eight years old, the court may, in its discretion, permit the child, who was a "bright" girl, to testify.<sup>2</sup> (Page 22.)
4. **CRIMINAL LAW—INSTRUCTIONS—REQUESTS—NECESSITY.** Failure of the court to charge on the good character of accused, proved by undisputed testimony, is not error, in the absence of a request therefor. (Page 23.)

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<sup>1</sup>*State v. Topham*, 41 Utah 39, 123 Pac. 888.

<sup>2</sup>*State v. Blythe*, 20 Utah 379, 58 Pac. 1108; *State v. Morasco*, 42 Utah 5, 128 Pac. 571.

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State v. McMillan, 46 Utah 19.

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Appeal from District Court, 3rd District; *Hon. M. L. Ritchie*, Judge.

D. MacMillan was convicted of a crime. He appeals.

**AFFIRMED.**

*Jos. W. Rozzelle* and *Willard Hanson* for appellant.

*A. R. Barnes*, Atty. Gen., and *E. V. Higgins* and *G. A. Iverson* Asst. Attys. Gen., for the State.

**FRICK, J.**

The defendant was convicted of the crime of having committed an "indecent assault" upon the person of a female child of the age of eight years, was sentenced to a term of imprisonment in the state prison, and appeals.

He was charged in the information as follows:

"That the said D. MacMillan, at the County of Salt Lake, in the State of Utah, on the 29th day of March, A. D. 1913, did willfully and feloniously make an assault upon ———, a female child under the age of 14 years, to wit, of the age of 8 years, and did then and there willfully, unlawfully, and feloniously take indecent liberties with the person of the said ——— without committing, or intending or attempting to commit, a crime of rape on the said ———, contrary," etc.

The information was based upon chapter 26, Laws Utah 1909, which reads as follows:

"Every person, who shall assault a child, whether male or female, under the age of fourteen years, and shall take indecent liberties with or on the person of such child, without committing, intending or attempting to commit the crime of rape, or the crime of assault with intent to commit rape, upon such child, with or without the child's consent, shall be deemed guilty of an indecent assault, and on conviction thereof shall be guilty of a felony."

It will be observed that the charge in the information is in the language of the statute.

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The defendant, before pleading to the merits, interposed a demurrer to the information upon the grounds: (1) That the facts stated therein do not constitute a public offense; and (2) that the acts constituting the offense are not set forth in ordinary and concise language, and in such manner as to enable a person of ordinary understanding to know what is intended in this: That said information fails to state in what manner or under what circumstances the said defendant made the assault upon the said ——— (child), and fails to state in what manner or under what circumstances the said defendant took indecent liberties with the person of said ——— (child). The court overruled the demurrer, and the ruling is assigned as error.

It is insisted that to charge that the defendant did unlawfully, etc., "take indecent liberties with the person of said" child is a mere general statement and is insufficient to apprise the defendant of the particular acts with which he is charged. It is contended that the case of *State v. Topham*, 41 Utah, 39, 123 Pac. 888, is decisive of the question in favor of the defendant's contention. We need not go into details to show why the principles of pleading which controlled that case have no application here. We think a mere cursory reading of the opinion in that case clearly demonstrates that the reasons why we held the information insufficient in that case also show why the information is sufficient in this case. It has been held that, under a statute like ours, an "indecent assault" and "indecent liberties" are convertible terms. In that connection the court said:

"The crime as defined by the statute is, in its legal tenor and import, an 'indecent assault.' \* \* \* The term 'indecent assault' is but the statutory definition of the crime epitomized." 4 Words and Phrases, 3537; *State v. West*, 39 Minn. 321, 40 N. W. 249.

The question raised by counsel in this case was presented to and passed on by the Supreme Court of Minnesota in *State v. Kunz*, 90 Minn. 526, 97 N. W. 131. That court, after setting forth the statute, which, in legal effect is like chapter 26, *supra*, disposes of the contention as follows:

"He further urges that the indictment is defective because it does not state the particular acts which constitute the alleged in-

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decent liberties. The claim is without merit, for the term 'indecent liberties,' when used with reference to a woman, old or young, is self-defining; and it would be as unnecessary and as indecent to allege the defendant's particular acts as it would be, if he were charged with rape or carnally knowing or abusing a female child under the age of consent, to set forth the evidence in the indictment."

We thoroughly agree with the Supreme Court of Minnesota that the term "indecent liberties," as used in the statute, is clearly self-defining. What more could be said, except to state the evidence which proves or establishes the offense? We think that every person of the most ordinary intelligence and understanding, who is familiar with merely the rudiments of the English language, understands what is meant when he, or any one else, is charged with having taken indecent liberties with the person of a child. To say more is merely to explain what was done, which, like in a charge of carnal knowledge, or of assault with intent to have carnal knowledge, is not necessary. We think the information was sufficient.

It is next contended that the district court erred in receiving the testimony of the little girl, with whose person the indecent liberties were taken, and who testified in 2, 3 behalf of the state, upon the ground that she by reason of her youth and want of comprehension of the solemnity of an oath, was incompetent to testify. The question of the competency of a child who is called as a witness, in the very nature of things, must, to a large extent at least, be left to the sound discretion of the trial court. When that court has passed upon the question either way, we cannot interfere, unless it is clearly made to appear that the court abused the discretion vested in it. Nothing is shown here in that regard, and the record of the child's testimony discloses nothing upon which we could intelligently act. The little girl in question, at the time of the alleged assault, was between seven and eight years of age, and, at the time she testified, was past eight years of age. The defendant in his testimony himself testified that she was a "bright girl." In the recent case of *State v. Morasco*, 42 Utah, 5, 128 Pac. 571, the witness, a little boy, was considerably younger, to wit, between five

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and six years of age, and we nevertheless refused to hold that he was incompetent as matter of law or that the court had abused its discretion in permitting him to testify for the state. That case was similar in character to this only the indecent assault was made upon a little boy, and he, like the little girl here, was the only eyewitness. See, also, *State v. Blythe*, 20 Utah, 379, 58 Pac. 1108, where the question is discussed. The district court committed no error in receiving the testimony of the little girl, nor in refusing to strike it from the record upon defendant's motion.

It is next urged that the time that the alleged offense was committed was not proven. We think otherwise. It is true the little girl could not give the date, nor the month, nor the year; but the time was sufficiently proved by other facts and circumstances.

It is next urged that the court erred in failing to charge the jury upon the question of defendant's good character. The defendant produced witnesses who testified to his good character. The state in no way opposed or contradicted his evidence relating to that subject. The defendant offered no requests to charge, nor did he ask the court to instruct the jury in its own language upon that subject. In 4 view of that we cannot see how we can say the court erred respecting the matter. It certainly cannot be assumed that simply because the defendant strengthened the legal presumption of good character by direct evidence, which the state did not dispute, he was prejudiced as matter of law, because the court failed to tell the jury what effect they were authorized to give the evidence of good character. Had the defendant requested a proper instruction upon that subject, and the court had refused it, the question might be different. The mere fact, however, that the court failed to instruct upon its own motion on the subject does not constitute error. As was said by the Supreme Court of Nebraska in *Sweet v. State*, 75 Neb. 270, 106 N. W. 33:

"While the giving of an instruction respecting evidence of good character may have been proper, noninstruction alone on that point, in the absence of a proffered instruction correctly stating the law, is not prejudicial error."

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Moody v. Millard County Drainage Dist. No. 1 et al., 46 Utah 24.

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This disposes of all the assignments that are argued in counsel's brief.

The judgment is affirmed.

STRAUP, C. J., and McCARTY, J., concur.

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MOODY v. MILLARD COUNTY DRAINAGE DIST. No.  
1 *et. al.*

No. 2768. Decided February 9, 1915 (149 Pac. 480).

**DRAINS—DRAINAGE DISTRICTS—ISSUANCE OF BONDS—SUBMISSION TO POPULAR VOTE—NOTICE.** Laws 1913, chapter 95, section 32, provides, as to special drainage district elections to determine whether bonds shall issue, that the supervisors shall request the county commissioners to call a special election within from thirty to forty-five days "from the date of filing such request and due notice of such election, which shall be held within the said district or at some convenient point adjacent to said district," and that such notice shall require the electors to cast ballots in the form therein specified, or in an equivalent form. *Held*, that the statute is meaningless as to the notice to be given, or by whom, when or in what manner it is to be given, and, as the giving of notice is a prerequisite to a valid election, an election held thereunder was invalid, though notice was given by posting and publication, as there was no statutory standard by which it could be determined whether the notice was sufficient.

Original proceeding by Milton Moody against Millard County Drainage District No. 1 and others to restrain the issuance and sale of bonds.

Writ made permanent.

*W. E. Rydalcch* for plaintiff.

*Thomas & Soule* for defendants.

STRAUP, C. J.

We are asked to restrain Millard County drainage district

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Injunction.

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and the board of supervisors of that district from issuing, selling, or disposing of bonds to construct drains, canals, and to make other improvements. On petition of Milton Moody, an aggrieved and interested party, we granted an order to show cause and a restraint in the meantime. Due return to our mandate was made. The matter was heard yesterday (February 8, 1915). Various grounds are alleged assailing the validity of chapter 95, Laws 1913, relating to drainage districts. The only one pressed involves that portion of section 32 of the act relating to notice of special elections to determine whether or not drainage bonds shall issue. It reads:

“Before such bonds shall be issued the board of supervisors shall request the board of county commissioners to, and the said board of county commissioners shall at once call a special election to be held within a time not less than thirty (30) nor more than forty-five (45) days from the date of filing such request, and due notice of such election which shall be held within the said district or at some convenient point adjacent to said district. Such notice shall require the electors to cast ballots, which shall, contain the words ‘Drainage Bonds \_\_\_\_\_ District \_\_\_\_\_, Yes,’ or ‘Drainage Bonds \_\_\_\_\_ District \_\_\_\_\_, No,’ or words equivalent thereto.”

The language is not only ambiguous, but so wanting in words, terms, or reference as not to express anything concerning the subject of notice. The word “notice,” if regarded as nominating anything, is left without a predicate; if as an object acted upon, it is left without action or an actor. It stands there unrelated and unconnected with anything preceding or following it. No sense can be gathered from the language as to the giving of a notice, by whom to be given, when to be given, nor the manner of giving it. Nor is it aided in such respect by reference to other provisions of the act. The giving of notice is a prerequisite to a valid election. It is averred in the return that notice by posting and publication was given. But until it is provided what that notice shall be, when and how it shall be given, and by whom given, there is no standard by which it can be determined whether what was done is or is not in compliance with law. We think the act bad in this particular, and that the



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writ should be made permanent. Such is the order; costs to the plaintiff. Counsel will prepare the writ. All the Justices concur.

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### HANCOCK v. LUKE, et al.

No. 2665. Decided March 9, 1915 (148 Pac. 452).

1. PLEADING—CONSTRUCTION. Under Comp. Laws 1907, section 2986, declaring that a pleading should be liberally construed with a view to substantial justice, the mere form of a denial of particular allegations of a complaint is not conclusive. (Page 32.)
2. CORPORATIONS—STOCK PURCHASE—RESCISSION—COMPLAINT—SUFFICIENCY. A complaint which alleged that plaintiff, relying on enumerated false representations by defendants, purchased shares of stock in a corporation which were worthless, and which had been tendered back and refused by defendants, stated a cause of action. (Page 32.)
3. PLEADING—MOTION FOR JUDGMENT ON. Plaintiff's motion for judgment on pleadings is in legal effect a general demurrer to the answer, and hence searches the entire record, including the complaint. (Page 32.)
4. PLEADING—MOTION FOR JUDGMENT ON. The courts possess the inherent power, independent of statute, to direct judgment on the pleadings in case a cause of action is not set forth in the complaint, or no legal defense is presented in the answer. (Page 33.)
5. PLEADING—MOTION FOR JUDGMENT ON—DENIAL. Plaintiff's motion for judgment on the pleadings should be denied, where the answer is not clearly defective. (Page 33.)
6. PLEADING—AMENDMENT—ALLOWANCE. Where it did not appear that defendant would be unable to state a defense, his motion for leave to amend, made immediately after rendition of judgment on the pleadings, was improperly denied, as coming too late, particularly as the answer attempted to traverse the allegations of the complaint. (Page 35.)

McCARTY, J., dissenting in part.

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Appeal from Third District.

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Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by George B. Hancock against Francis G. Luke and another.

Judgment on the pleadings for plaintiff. Defendants appeal.

REVERSED AND REMANDED.

*Chris Mathison, A. L. Hoppaugh and S. P. Armstrong* for appellants.

*M. E. Wilson and Bismark Snyder* for respondent.

FRICK, J.

This is an appeal from a judgment on the pleadings. The plaintiff, an attorney at law, commenced this action in the district court of Salt Lake County on March 29, 1913, to rescind a contract entered into by him with the defendants in December, 1908. The plaintiff alleges in his complaint:

“(1) That heretofore, to wit, on or about the 12th day of December, 1908, at Salt Lake City, Utah, plaintiff and defendants entered into a contract in writing, by the terms of which defendants agreed to sell to plaintiff, and plaintiff agreed to purchase from defendants, five shares of the capital stock of the Merchants’ Protective Association, a corporation under the laws of Utah, for the sum of \$2,500, and that a certificate or writing, purporting to be certificate No. 33 of said the Merchants’ Protective Association, for said five shares of stock, was thereupon delivered to plaintiff, and plaintiff thereafter paid defendants the said sum of \$2,500.

“(2) That in and by the terms of said contract it was further agreed that plaintiff should be employed for an indefinite period by said the Merchants’ Protective Association, at an agreed monthly salary, the defendants assuming to act for and represent said corporation to the extent of making said contract for such employment; and that, in accordance with

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the said provision of said contract, plaintiff entered into the employ of a collection business purporting to operate as and in the name of the Merchants' Protective Association, on or about the said 12th day of December, 1908, and continued in its employ until on or about the 1st day of January, 1913, during which time he received the monthly salary prescribed in said contract.

“(3) That immediately before and at the time said contract was executed, and as an inducement to plaintiff to execute the same, defendants stated and represented to plaintiff that a certain collection business then being conducted by defendants was owned by the Merchants' Protective Association, a corporation under the laws of Utah, with a total authorized capitalization of 100 shares, of which the defendants were the owners of not less than 85 shares, they having purchased all said stock from the original incorporators of said corporation and their assignees; that defendant Francis G. Luke was the general manager of said corporation, and that it was in an exceedingly prosperous condition, so much so that its stock, which had a par value of only one dollar per share, had increased to an actual value of \$500 per share; that it was the owner of judgments against various individuals amounting to at least \$1,000,000, all of which could and would be collected, and the proceeds of which, when collected, would belong to said corporation; that it had a large reserve fund, amounting to not less than \$10,000 on deposit with McCornick & Co., Bankers, of Salt Lake City, Utah; that it was not indebted to any of its clients in any sum whatever, but had always kept its collections of money belonging to clients fully paid up as fast as such collections were received by it; that its business standing in the State of Utah and elsewhere was first-class, which would enable it to increase its business in the future, and that it had unsettled business in its possession, which, without any new business whatever, would enable it to continue operations and pay dividends of not less than 12 per cent. per annum upon its stock, valued at \$500 per share, for many years.

“(4) That plaintiff relied upon said representations so made to him by defendants, and believed the same and each

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and all of them to be true as stated, and such representations formed the sole and only consideration and inducement to plaintiff to enter into said contract with defendants, which he would not have executed and entered into, had he not believed said representations and each of them to be true."

The plaintiff, in substance, further alleged that the representations set forth were false and were known to be so by the defendants; that they were not, at the time said contract was entered into or at all, the owners of the capital stock aforesaid; that said collection business was not as represented by them; that the defendants did not, nor did said Merchants' Protective Association, own collectible solvent judgments to the value of \$1,000,000, or any other sum in excess of \$100; that neither the defendant Francis G. Luke individually, nor said association, had on deposit with McCornick & Co., Bankers, or elsewhere, any moneys, and that said capital stock was not worth in excess of one dollar per share; that in the month of June, 1912, he obtained the first intimation or information that the representations made by said defendants respecting the extent and value of their business and the amount of their assets and the value of said stock were false, and that they knew that said representations were false when made; that said capital stock was and is worthless, and plaintiff, in the month of January, 1913, and before bringing this action, tendered said stock to said defendants and demanded repayment to him of said \$2,500 paid therefor, which demand defendants refused. The plaintiff did not set forth the contract, but contented himself with stating its effect.

The defendants filed an answer in which they admitted the formal parts of the complaint and explained and denied the allegations of the complaint in the following terms:

"(2) The defendants deny that they procured said agreement from the plaintiff by fraud and misrepresentation, as alleged in paragraph numbered 3 of the plaintiff's complaint, and deny, particularly, that, immediately before and at the time said contract was executed, they made any or all of the following representations: That the stock of said Merchants' Protective Association had an actual value of \$500 per share; that the said association was the owner of judgments, amount-

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ing to \$1,000,000, all of which could and would be collected, or that the proceeds of each judgment would, when collected, belong to said corporation; that it had on deposit with McCornick & Co., Bankers of Salt Lake City, Utah, a large reserve fund amounting to not less than \$10,000; that said Merchants' Protective Association was not indebted to any of its clients in any sum whatever, or that it always kept fully paid up its collections of money belonging to clients as fast as such collections were received by it; that it had unsettled business in its possession which, without any new business whatever, would enable it to continue operations and pay dividends of not less than twelve per cent. per annum upon the stock, valued at \$500 per share, for many years.

“(3) And, on the contrary, the defendants say: That, at the execution of said contract, the plaintiff well knew, and for two months prior thereto had known, that, by an agreement between the defendant Francis G. Luke and the said Merchants' Protective Association, the said defendant was entitled to all the earnings, profits, and income of the said association, including its proportion of any and all judgments owned or controlled by it; and the defendants did not, at any time before or at the execution of the said contract between the defendants and plaintiff, represent or agree that the proceeds of such judgments, or the proportionate share thereof belonging to said Merchants' Protective Association, should be set aside as a surplus fund or to increase the capital and assets of the said corporation, or that the same should be paid out as dividends to its stockholders, all of which said plaintiff well knew; and the defendants show that it is recited in said contract that said corporation, Merchants' Protective Association, does not pay dividends, and at the execution of said contract the plaintiff understood and knew that he was not, and would not, be directly interested in the business of said corporation or in the profits of the same, whether as dividends or interest or by whatever name they might be called, but, on the contrary, the plaintiff knew that defendant Francis G. Luke was entitled to all the income, earnings, and profit of said Merchants' Protective Association by reason of the agreement hereinbefore mentioned, and accepted the personal cove-

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nants of the defendants to pay him the monthly salary stipulated for in said agreement, and to pay the interest on the \$2,500 so invested by the plaintiff; and the defendants further allege that before and at the time of the execution of said contract between plaintiff and defendants, and before and at each and all the times plaintiff paid to defendants the installments of said \$2,500, as stipulated in said agreement, the plaintiff had full knowledge of the true value of said stock, of the course of business between the said Merchants' Protective Association and its clients, and of the resources, assets, liabilities, and actual condition of said corporation.

“(4) The defendants deny each and every other allegation in the said complaint contained.”

The defendants then proceed to set forth, with much particularity and detail, the acts and conduct of the parties with respect to the contract referred to by the plaintiff. The relation of the defendants to the collection business of said association and their rights or interest therein are also set forth. The extent and value of the business are also stated. In other words, the defendants set forth their version of the transactions between the parties relative to said collection business and pursuant to said contract, and in stating their version, while they refer to the same matters referred to in the complaint, they nevertheless state many of them in such a manner as to negative the statements of the plaintiff. The contract is also set forth, and it is alleged that thereunder the plaintiff was paid and received annually twelve per cent. interest on said \$2,500, and also received the monthly salary specified in the contract; that, at the time he entered into said contract and accepted employment thereunder, he was a young attorney without practice or experience, and that he entered into said contract and paid said sum of \$2,500, and entered upon said employment, for the purpose of gaining experience and the necessary experience to fit him for the practice of law, and that he was paid more than his services were actually worth. By reference to the contract, it will be seen that no time is specified therein respecting the duration of said employment. All that is mentioned there in that regard is that the salary of the plaintiff

is to be increased from time to time as the increase in profits of the association might justify, not, however, to exceed the sum of \$250 per month; that at the expiration of ten years the defendants agreed to repurchase said stock from the plaintiff in case he should desire to sell it and to pay him therefor one-half the amount paid by him for it, or that they would pay him a salary of \$250 per month from that time forward.

There were no objections interposed by either party to the pleadings until the case was called for trial, when the plaintiff moved for judgment on the pleadings, which motion was granted by the court, and judgment for the plaintiff was accordingly entered for \$2,500. The defendants assign the ruling of the court in granting said motion and in entering judgment as aforesaid as error.

Where, as here, many of the denials contained in an answer are cast in the form of negative pregnant, all of which are followed by a sweeping general denial, it is not always easy to determine just what the effect of the denials 1 is. This is especially so where, as here, each party also affirmatively states his own version of a series of transactions which, in many respects, differ in their details and effect. Under our statute, "a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties." Comp. Laws 1907, Section 2986. Where it is clear, therefore, that a denial of particular allegations of the complaint was intended, the mere form of such denial is not always conclusive.

Some point is sought to be made by the plaintiff upon the fact that, at the time the motion for judgment on the pleadings was made, the defendants also interposed an objection to the introduction of any evidence upon the ground that the complaint did not state facts sufficient to con- 2, 3stitute a cause of action. There is nothing to that contention. The motion for judgment on the pleadings was, in legal effect, a general demurrer to the answer, and such demurrer searches the entire record, including the sufficiency of the complaint. If the complaint, therefore, had been deficient in substance, the motion, regardless of defendants' objection, would have been fatal to it. We are of the opinion, however,

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that the complaint was sufficient to withstand a general demurrer. The question therefore arises: Did the court err in sustaining the motion for judgment on the pleadings and in entering judgment as prayed for in the complaint?

We have no statute authorizing such a motion. The courts are, however, practically unanimous in holding that courts of general jurisdiction possess inherent power, independently of statute, to direct judgment on the pleadings in case a legal cause of action is not set forth in the complaint 4, 5 or, if there is, when no legal defense is presented therein in the answer. Motions for judgments on the pleadings are, however, not favored by the courts, and upon such a motion the pleadings will be construed with great liberality in favor of the party whose pleadings are assailed. *Bowles v. Doble*, 11 Or. 480; *Currie v. So. Pac. Co.*, 23 Or. 400, 31 Pac. 963; *James River, etc., Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7; *Giles, etc., Co. v. Recamier Mfg. Co.*, 15 N. Y. St. Rep. 354. In the last case cited the court says:

"It is a dangerous practice to allow either party to interpose an oral demurrer, at the trial, to the pleading of his adversary. If a pleading be substantially defective, the honest course is to demur to it, and thus give court and counsel a fair opportunity to examine and consider the question of law that is involved. If there be any reasonable doubt as to the insufficiency of the pleading, the court should deny a motion that is sprung at the trial for judgment on the pleadings."

See, also, 31 Cyc. 605, 606, to the same effect.

Courts generally do, and always should, require the parties to proceed to the merits, if such a course is permissible, after giving the allegations and averments contained in the pleadings, and the necessary inferences arising therefrom, a liberal construction and application. Of course, if in no view that may be indulged in favor of the pleadings the law sanctions a defense, then but one course is permissible, and that is judgment for plaintiff on the pleadings. It is contended that such should be the result under the answer in the case at bar. It is true that the denials, with the exception of the general denial "of all other allegations," are in the nature



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of negative pregnant, and thus ordinarily do not raise an issue. It is also true that the general denial can cover only those matters not covered by the special denials, which perhaps are not many nor of great importance. There are, however, many affirmative statements and averments in the answer which, when liberally construed, as they must be, may nevertheless put in issue some of the material allegations of the complaint. An affirmative statement in one pleading very often is equivalent to a denial of another affirmative statement in the pleading of the opposite party, and this is especially true when construed in connection with a denial. Plaintiff, however, contends that, even when so construed, the answer, considered as a whole, presents no defense to the cause of action set forth in the complaint. For example, it is contended in that connection that it is apparent from the answer itself that the plaintiff received no consideration from the defendants, or either of them, for the \$2,500 paid by him to them, and hence he, in any event, is entitled to recover that sum from them. We need not and we shall not now stop to consider whether a plaintiff may entirely depart from the allegations of his complaint and rely upon the allegations contained in an adversary's answer to recover a judgment upon a theory entirely different from that upon which the complaint is framed. That he may do so may well be doubted. It is, however, further contended that from an inspection of the contract, which is set forth by the defendants as a part of their answer, it is apparent that its provisions are unenforceable because they lack mutuality; and for the further reason that no time is specified in the contract during which the employment therein contemplated should continue. In this connection it should be remembered that the plaintiff in his complaint shows that he continued for a period of more than four years to enjoy all the benefits of the contract he now seeks to repudiate. Let it be conceded, therefore, that the contract is unenforceable, yet it does not follow from that alone that either of the parties, after receiving the fruits thereof, may not in equity be required in some form to account to the other party. Without now attempting to determine the equities and rights of the parties to the contract, we remark

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that it may well be that after the answer is amended in accordance with the offer made by defendants' counsel, and all the evidence, pro and con, is heard and considered, and the law is applied thereto, although the plaintiff may be entitled to judgment, yet he may not be entitled to the full sum of \$2,500 as against the defendants. The contract is not void because it contravenes a positive statute, nor because it is contrary to public policy. Whatever rights, therefore, may have arisen by reason of its part performance may require adjustment as between the parties by a court of equity. We desire it distinctly understood, however, that we do not at this time pass upon what the rights of the parties may be under the contract, or under the present state of the pleadings, in view of its part performance. That matter, as a matter of course, cannot be adjusted, except upon a full hearing. All that we now hold is that although, under the answer as it now stands, it were conceded that plaintiff is entitled to judgment, yet inasmuch as the defendants have applied for leave to amend their answer, and in view that in our judgment they should be permitted to amend, therefore the extent of the relief that defendants may be entitled to, if any, cannot be now determined.

Immediately following the ruling of the court sustaining plaintiff's motion for judgment on the pleadings, defendants' counsel asked leave to amend the answer as hereinafter set forth. The court denied the application to amend, and the ruling of the court is now assigned as error as follows: 6

"The court erred in denying defendants' motion to amend their answer."

In defendants' brief the foregoing assignment is reiterated, and counsel then insist and argue that the court erred in refusing to allow them to amend the answer. The authorities in support of their contention are cited on page 14 of their brief. What was said in the brief was supplemented and enlarged upon in oral argument at the hearing. In their printed abstract counsel set forth what occurred at the time the application to amend was made in the following words:

"Thereupon the defendants moved to amend the answer. Before defendants could state the particulars wherein they

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proposed to amend, the court sustained an objection by plaintiff that the motion came too late, and overruled the motion, to which defendants excepted."

Counsel for plaintiff assert that the proceedings are not correctly reflected in the foregoing statement, and they have set forth the proceedings which they contend took place at the time, by producing a transcript of the stenographer's notes. The transcript produced reads as follows:

"Mr. Armstrong (for defendants): Now we make a motion, if the court please, to amend the answer. Mr. Wilson (for plaintiff): We wish to resist that motion, of course, your honor, because it comes too late. In the first place, there isn't anything to amend. Mr. Armstrong: There are some allegations in the answer that we hadn't noticed, having been called into the case just lately, that may be a little ambiguous. Mr. Snyder (for plaintiff): I submit, your honor, it is too late now. Mr. Wilson: I would like to be heard on it if the court has any idea of entertaining it. The Court: It will be overruled. Mr. Armstrong: Take an exception. Mr. Wilson: We ask for judgment, your honor. The Court: You may have it. Mr. Armstrong: Exception. Mr. Wilson: We will draw it up later and serve it on counsel. The Court: We will just consider ourselves adjourned."

If we take plaintiff's version of what occurred at the time, still we cannot see how it helps his case. It is manifest that, immediately after the court had announced its ruling upon the motion for judgment on the pleadings counsel for defendants moved "to amend the answer." Up to the time the court ruled, and while the motion remained "in the breast of the court," it certainly could not be known what the ruling would be. If the ruling had been favorable to the defendants, then, perhaps, in the view of counsel, no amendment of the answer would have been necessary. If, however, the ruling was in favor of the plaintiff, as it in fact was, then, unless counsel for defendants desired to stand on their answer, they had the right, we think, to ask and to obtain leave to amend the same. We cannot conceive what plaintiff's counsel meant by the statement that the motion for leave to amend came "too late." Certainly no judgment had been formally ren-

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dered at the time, and of course none could have been entered, as the colloquy between court and counsel shows. Why, then, was the offer to amend not timely? In case pleadings are assailed, must a party move to amend before he is apprised of what the ruling of the court will be? We think not. We are of the opinion, therefore, that the motion for leave to amend was timely. We are also of the opinion that, under the circumstances, it constituted reversible error for the court to deny the motion for leave to amend. It is quite clear that it was the intention of the attorney who drew the answer to deny the allegations of the complaint respecting fraud and the misrepresentations as well as some of the other allegations. It is equally apparent that, in the opinion of the District Court, he had failed to do that. It is also clear that, in pleading the affirmative matters contained in the answer, the pleader left many of them in doubt by failing to make clear and concise statements. All those statements, as well as the denials, were amendable, however, and, if properly amended, might set forth a defense to the cause of action, to some extent at least, either negative or affirmative. What we mean is that it cannot be said in advance that the answer could not be so amended as to set forth at least a partial defense to the matters set forth in the complaint. If, in this case, plaintiff had interposed a general demurrer to the answer, and the court had sustained it, the defendants would have been permitted to amend their answer as a matter of course, under the practice, if not as a matter of absolute right. This is the view that is taken by the author of *Pomeroy's Code Remedies* (4th Ed.), Section 454. In our judgment there is not a respectable attorney practicing in this jurisdiction who would question the right of his adversary to at least attempt to amend a pleading after a general demurrer thereto had been sustained by the court. Is there any reason for a different rule in case of a motion for judgment on the pleadings? We confess our inability to discover any substantial difference between a general demurrer and a motion for judgment on the pleadings, in so far as the right to amend is concerned. In *Doll v. Good*, 38 Cal. 287-291, the Supreme Court of California directed the lower court to grant

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defendant leave to amend his answer, although the court held that the lower court erred in not sustaining plaintiff's motion for judgment on the pleadings. Courts ordinarily encourage rather than discourage all proper amendments to the pleadings, to the end that a full hearing may be had upon all phases of the controversy in the trial courts before the case is taken to the Appellate Court for review. In our judgment, all the authorities are to that effect.

Bliss on Code Pleading (3d Ed.), Section 429, says:

"Courts should be liberal in allowing amendments to the end that cases may be fully and fairly presented on their merits."

The author further says:

"The power of amendment of pleadings is great under the Code. The real limitation seems to be that the amendment shall not bring a new cause of action."

The rule is admirably stated by Mr. Justice Jaggard in the case of *Todd v. Bettingen*, 102 Minn. 260, 113 N. W. 906, 18 L. R. A. (N. S.) 263, in the following words:

"The right of the trial court to make amendments is recognized by statute and enforced by well-settled practice, permitting such amendments with great liberality, so as to properly determine the merits of legal controversies. The trend of modern judicial opinion is wholly opposed to allowing mere mistake in form to defeat the substantial rights of parties. The right of amendment in the earlier stages of the proceedings may be a matter of course. In later stages, amendments are liberally allowed for cause shown, upon application to and by leave of the court, upon terms, it may be."

We can see no reason whatever why the defendants in this case should be denied the right of amendment when the exercise of that right is a matter of daily occurrence in our courts of justice. True, motions for judgment on the pleadings may be rare, but that is no reason why the right of amendment should be denied when timely proposed, as in the case at bar. Nor can we conceive how any one can say in advance that in this case at least a partial defense may not be set forth by a proper amendment to the answer. Nor can we see how it can successfully be contended that the motion for leave to amend was not timely made, or that prejudice or undue delay will result if allowed.

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The judgment is therefore reversed, and the cause remanded to the District Court of Salt Lake County, with directions to set aside the judgment and to proceed with the case as herein suggested, to permit the defendants to amend their answer, and, if the court is of the opinion that the answer does state a defense as just indicated, then to permit the plaintiff also to amend, if he is so advised, and to proceed to hear the case upon the merits and to make such disposition thereof as in his judgment the law and the facts require, and in accordance with the views herein expressed. Defendants to recover costs.

STRAUP, C. J.

It is rare where a court, on pleadings, ought to render judgment against one not slothful and offering to amend, unless nothing issuable is or can be tendered. It is claimed nothing such was tendered; but look at the ruling. To the defendants' offer "to amend the answer" came the objection "too late" and "nothing to amend." On that objection leave to amend was denied, not because nothing issuable was tendered, but because the offer to amend, regardless of substance, came too late, and because the answer was unamendable. It is claimed I am in error as to this. The record must speak as to that. It is fully set forth in the prevailing opinion. Looking at the objections and the ruling, I think it clear that leave to amend was denied because the offer came too late, and because there "wasn't anything to amend." Counsel's remark at the time that some of the allegations of the answer "may be a little ambiguous" is pointed to as indicating the particulars of a tendered amendment. I think that somewhat strained. Then see the only objection following the remarks, "I submit, your honor, it is too late now," the same objection interposed at the threshold of the offer "to amend the answer." Upon that followed the ruling denying the offer. Now, I do not think the ruling should be upheld on the ground that nothing issuable was tendered, for manifestly, on the objections and by the ruling, no opportunity was given the defendants to amend or to present anything. Granting or refusing leave to amend a pleading, and permitting or denying a proposed amend-

ment, are different things. One should not be punished for failure to propose terms of a good amendment, when at the threshold leave to amend at all was denied him. I think the court ought to have granted leave. To have done so would not have occasioned unnecessary delay or any harm. Were there exigencies demanding it, the court could have required a tender of the amendment within even a few hours. When made, the court then could have determined what, if anything, issuable on the pleadings, as amended, was presented, and could have proceeded accordingly. That the present answer may be insufficient is reason to grant, but not to deny, leave to amend. It certainly is not so bad as to be wholly incurable.

Then it is further claimed that I rule the case on something not presented and not argued. Again must we submit to the record. The assigned errors are correctly stated in the prevailing opinion. They go to the rulings: (1) Holding the complaint good; (2) granting judgment on pleadings; and (3) refusing defendants to amend. True, the greater part of the briefs is devoted to rulings 1 and 2, but 3 is not unnoticed. It also is discussed, maybe not in language used by me; but I prefer to use my own. The point, however, is there, is assigned, and is discussed. It is also noticed in the prevailing opinion, and the case largely ruled on it. In that I concur. I do not think it fair to the record to treat it as abandoned and to review the case alone on ruling 1 and 2. But let us look at 2. The action is to rescind a contract on the ground of fraud. The contract itself is not set forth in the complaint, nor is a copy attached to it. Its contents are pleaded in most general and vague terms. They are that the plaintiff agreed to buy and the defendants to sell five shares of the capital stock of the association for \$2,500, and that "thereupon the stock was delivered to the plaintiff, who paid the defendants said sum of \$2,500"; that it was further agreed that "the plaintiff should be employed for an indefinite period" by the association "at an agreed monthly salary"; and that in pursuance of the contract he entered and continued in the employment for about four years, "during which time he received the monthly salary prescribed in said contract." The amount of salary he was to receive, or did

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receive, is not alleged by him. He, however, did allege that his employment and salary were a part of the contract which he seeks to repudiate and rescind. That is all he states as to the substance of the contract. He asks to have it rescinded on the ground of misrepresentations. The representations are alleged in paragraph 3 of the complaint and as set forth in the prevailing opinion, followed by allegations of their falsity, plaintiff's reliance on them, and injury. These constitute the charging part of the complaint. They are denied by paragraphs 2 and 3 of the answer, also set forth in the prevailing opinion, followed by a general denial and affirmative averments. Now, conceding that the denials of the representations, in the language of the complaint, are insufficient, yet it ought further be conceded that they are amendable. If they are bad and not aided by other denials and averments in the answer, they are so because they are not sufficiently specific and certain. And, if the defendants desired to make them more specific and certain, why deny them that right? But I think the denials, aided as they are by the general denial, and other affirmative averments, sufficiently put in issue the charging portions of the complaint to ward off a motion for judgment on pleadings.

The defendants pleaded the contract in extenso by attaching a copy of it to the answer. This, it is said, for various reasons, is a bad and an unenforceable contract, and for that reason should the defendants, in equity, be required to repay plaintiff the \$2,500 received by them from him. Then is it also said that the contract together with the defendants' affirmative allegations, shows that the plaintiff, in legal effect, but loaned the defendants \$2,500, which they, on his demand, ought to repay. But see the cause declared on and then how plaintiff wanders from it. He must take a stand somewhere. He took it where he was required to take it—in his complaint. It is to rescind the contract on the ground of fraud, alleged false representations relied on by him to his injury. To aid and support him in that he, of course, may look to the answer. But he may not wholly depart from his complaint and look alone to the answer as the foundation for another cause or other relief. To recover at all he must recover within the



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cause and upon the grounds stated in his complaint. To permit him to go beyond that is to disregard basic principles and functions of pleadings. Neither the contract as pleaded by the defendants nor their affirmative allegations aid the plaintiff in the cause as stated by him. They do not show that the alleged representations were made, or that they were false, or that the plaintiff relied on them, or because of them he was induced to enter into the contract, or caused to perform any of its conditions, or was harmed. They, in such respect, tend to negative all that.

And then to entitle him to recover on his alleged theory of repudiation and rescission and on his alleged grounds of fraud and misrepresentations, and to be restored to what he in pursuance of the contract paid out, he must himself do equity and account for or offer to restore what, if any, benefits he himself received on part performance and in pursuance of the contract. He alleged he offered to surrender the certificate of stock. But he also alleged that he for four years "received the monthly salary prescribed in said contract." He did not allege what that was. The defendants alleged it was \$100 a month for the first three months, \$125 for the next three, and \$150 a month thereafter. They alleged that he also received twelve per cent. per annum on the \$2,500 or \$1,200 for the four years which was paid in lieu of dividends. It may be that what he received by way of salary is balanced by services rendered by him, that by way of dividends by interest on the money paid out by him, and hence on a rescission of the contract, equity would not require restoration on his part, further than contained in his offer, a surrender of the certificate. But it is better to adjudicate than to assume that. If on the other hand, and as is argued in the next breath, the contract is subsisting but terminable at will, and that by its terms the plaintiff, in legal effect but loaned the defendants \$2,500, subject to his demand, then let him so aver and proceed on that theory. I do not think he can do so on what he has now averred. I therefore think the case should go back with directions to set the judgment aside and to permit either party on his application to amend. If neither desires to amend then to proceed to trial on the issues presented by the complaint.

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McCARTY, J. (dissenting).

I, too, am of the opinion that the complaint states a cause of action. Taking the answer by the four corners, and assuming all the matters therein alleged that are not in conflict with the provisions of the contract to be true, plaintiff is entitled to recover. It is suggested that the specific denials of the answer, aided by the general denial and the affirmative matters pleaded therein, "put in issue the charging part of the complaint." If this is true, then, of course, the defendants were entitled to a trial on the merits. I think, however, an examination of the pleadings will show that the answer utterly fails to put in issue any material allegation of the complaint. The denials of fraud, etc., contained in the answer are, so, far as material here, as follows:

"Defendants deny that they procured said agreement from the plaintiff *as alleged* in paragraph 3 in plaintiff's complaint, and deny particularly that, *immediately before and at the time said contract was executed*, they made any or all of the following representations" (reciting the substance of the allegations of fraud contained in the complaint).

These denials are in the form of negative pregnant, and do not put in issue the substance of the allegations of the complaint charging fraud; but they, in effect, admit the important facts—the fraud—therein averred. 1 Bates Pl. & Pr., p. 340; Pomeroy's Rem., Section 509; Bliss, Code Pl. 332; 31 Cyc. 253; *Coal Co. v. Sanitarium Co.*, 7 Utah 158, 25 Pac. 742; 5 Words and Phrases 4739; Volume 3, Second Series, 550. Nor are the denials aided by the general denial, which is as follows:

"The defendants deny *each and every other* allegation in said complaint contained." (Italics mine.)

It will thus be observed that the general denial does not deny, nor is it directed to, any of the allegations of the complaint that are specifically denied. The answer must be considered and construed in connection with the provisions of the contract referred to in the answer, and which is made a part thereof. The contract, so far as material here, provides:

"That the parties of the first part (defendants), in consideration of the payment of two thousand five hundred dol-

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lars, \* \* \* and the employment of the party of the second part (plaintiff), as hereinafter set forth, hereby agree to sell to the party of the second part five shares of the capital stock of the Merchants' Protective Association corporation, being five one-hundredths of the total capitalization, and to guarantee the profit thereon as follows: (1) The parties of the first part hereby guarantee to the party of the second part twelve per cent. per annum upon the amount paid for said stock (in lieu of dividends, said corporation paying no dividends), so long as said party shall remain in the employ of the Merchants' Protective Association, and, in addition, guarantee the party of the second part salary during said employment as follows: One hundred dollars per month during the first three months and one hundred and twenty-five per month for the next three months \* \* \* (3) And the party of the second part hereby agrees during the existence of said contract to work for and under the direction of the first parties as attorney at law, and render his best services for the corporation above named. \* \* \* The salary and compensation above referred to to be increased by said corporation from time to time as the increased net profits of the association justifieth, but said salary is not expected to exceed two hundred fifty dollars per month. (4) The parties of the first part agree that at the expiration of ten years, should the party of the second part want to sell out, that the parties of the first part will purchase back from him the stock which he originally bought and pay him one-half of what he paid for it. \* \* \* Dated December 12, 1908."

This contract was terminable at will by either party. The Lukes could have terminated the contract and dispensed with the services of Hancock on the day he entered their employment; and, on the other hand, Hancock at any time could have quit the services of the Lukes; and in neither case could one party have successfully maintained an action for damages against the other. *Price v. Loan & Savings Co.*, 35 Utah 379, 100 Pac. 677, 19 Ann. Cas. 589, and cases therein cited. The contract being terminable at will by either party, the allegations contained in the complaint that plaintiff was induced to enter into it by false and fraudulent representa-

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tions should be regarded as matters of inducement only, and the prayer that the contract be canceled as redundant. Neither the proof of the one nor the granting of the other is, as I view the case, a necessary pre-requisite to plaintiff's right to recover. If, however, the doctrine announced in *Price v. Loan & Savings Co., supra*, shall be repudiated and the contractual relations of these parties, under the terms of the agreement, shall be held to be interminable, and that plaintiff therefore could not, except for fraud, terminate the agreement without forfeiting to the defendants the \$2,500, then, of course, the fraud and fraudulent representations charged in the complaint are matters of substance and an essential element in plaintiff's cause of action. But, taking this view of the case, it follows that since the fraud charged in the complaint is admitted by the negative pregnant denials, herein referred to, of the answer, the question of whether the contract was terminable at will by either party is not of vital importance.

The affirmative allegations of the answer, so far as material, are as follows:

(1) That on December 12, 1908 (the day the contract referred to was made and executed), the defendants were the owners of more than 85 per cent. of the capital stock of the Merchants' Protective Association, organized under the laws of Utah "with a capital stock of \$100, divided into 100 shares of the nominal value of \$1 each; that the capital, property, and assets of said corporation have always been of small value; that since the year 1893, and during all of the times mentioned in the plaintiff's complaint, the defendant Francis G. Luke has had an agreement with said corporation whereby he was entitled to the entire income from the business of said Merchants' Protective Association."

(2) "That on the 12th day of December, 1908, the trade-name of the said Merchants' Protective Association and the good will of the business so carried on by it were of great value and *due solely to the energy, enterprise and business acumen of the defendants*, and to the large amount of money invested in the said business by the defendant Francis G. Luke."

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(3) That during the period from the year 1901 to and including the year 1912 "the defendants have annually received from the profits of said business large sums of money, to wit, in the aggregate for the period aforesaid, the sum of \$111,734.64. \* \* \*

(4) That before and at the time of the execution of said agreement the defendants informed the plaintiff that such stock was of *small or no intrinsic value*, and informed him that their purpose in requiring the purchase of the same was not in any wise to make him a partner in the business but a pledge or guaranty that he would not, after a comparatively brief period in their employ, \* \* \* quit the service of the defendants. That the plaintiff understood and knew that he was not, and would not be, directly interested in the business of said corporation or in the profits of the same, whether as dividends or interest or by whatever name they might be called; but, on the contrary, the plaintiff knew that defendant Francis G. Luke was entitled to all the income, earnings, and profit of said \* \* \* association by reason of the agreement hereinbefore mentioned, and (plaintiff) accepted the personal covenants of the defendants to pay him the monthly salary stipulated for in said agreement, and to pay the interest on the \$2,500 so invested by plaintiff."

(5) That defendants "required of the plaintiff, as a condition of such employment, and particularly as an earnest, that he would remain in their employ, that he purchase five shares of the capital stock of the said Merchants' Protective Association \* \* \* at the price of \$2,500, \* \* \* and the defendants agreed to pay interest on the said purchase price during the continuance of their agreement."

(6) That defendants "have duly performed all the conditions of the said contract on their part to be performed and have paid the plaintiff salaries far in excess of what, by reason of the plaintiff's negligence and inattention to business, his services were worth to defendants. And, until said contract was terminated by the plaintiff, \* \* \* the defendants were ready and willing to perform every condition thereof on their part to be performed."

(7) That plaintiff "left said service at the end of four

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years without the consent of the defendants. \* \* \*

"Wherefore the defendants pray that the plaintiff take nothing by his said complaint, and that it be dismissed."

It will thus be observed that the defendants, in their answer, affirmatively allege that they obtained \$2,500 of plaintiff's money, which they now hold, for five shares of the capital stock of a corporation, whose "assets and property \* \* \* have always been of small value," and that the five shares of stock was "of small or no intrinsic value." They further, by the affirmative allegations of their answer, show that the stock has no speculative or prospective value because Francis G. Luke has "an agreement with the said corporation whereby he is entitled to the entire income of the corporation." True, they suggest in the discussion of the case in their printed brief that, "in case of the death of Francis G. Luke or his severance of connection with the corporation as manager," the business of the corporation "would become a valuable asset of the stockholders." As I have pointed out, it is alleged in the answer that the "great value" of the "trade-name" and "good will" of the business is "due solely to the energy, enterprise, and business acumen of the defendants." Therefore, according to the allegations of the answer, it necessarily follows that if Francis G. Luke, as suggested by counsel, should sever his connection with the corporation, the business would be deprived of much, if not practically all, the "energy, enterprise, and business acumen" which it is claimed makes its "trade-name and good will \* \* \* of great value." Moreover, there is no allegation in the answer that there is any probability that Francis G. Luke will, during the lifetime of the plaintiff, pass to that bourne from which "no traveler returns," and there is nothing in the answer from which it can be inferred that he has any intention, during the existence of the corporation, of canceling and surrendering the contract, which, up to the time of filing the answer, has yielded him a net profit of over \$10,000 annually. These, however, may be the "ambiguities" counsel had in mind when they asked leave to amend. Let that be as it may, even if the answer contained such allegations, and they were admitted to be true, they would not defeat, nor tend to defeat, plaintiff's

action. Defendants allege in their answer, and the contract shows, that the pretended purchase of stock by the plaintiff "was not in any wise (intended) to make him a partner in the business." Therefore, even if Francis G. Luke should sever his relations with the business, such action on his part would not in any way affect plaintiff's rights and obligations under the contract.

Plaintiff, under the allegations of the complaint, and by virtue of the contract as defendants themselves construe it, is entitled to judgment. Defendants, in their printed brief, say:

"The \$2,500 was paid (them) under the *guise* of the purchase of five shares of stock," and that "he accordingly \* \* \* bought his way into the practice of the law, not by payment of a lump sum outright, \* \* \* but by turning in on halves what business he had on hand and by payment of \$2,500 in the *nature of a loan on which he received twelve per cent. interest.*"

The \$2,500 was therefore, under the allegations of the answer, and according to defendants' construction of the contract, payable to plaintiff on demand.

When the case was called for trial, plaintiff moved for a judgment on the pleadings, and the defendants objected to the taking of any testimony on the complaint and moved for a dismissal of the action. In other words, both parties had presented a motion to the court for a judgment on the pleadings. After the issues of law thus presented had been decided in favor of plaintiff and against the defendants, counsel for defendants, addressing the court, said:

"Now we make a motion \* \* \* to amend the answer."

Counsel for plaintiff, addressing the court, said:

"We resist the motion \* \* \* because it comes too late. \* \* \* there is nothing to amend."

Counsel for defendants:

"There are some allegations in the answer that we hadn't noticed, having been called into the case just lately, that may be a little ambiguous."

The court had before it the answer, which, while it contains much redundant matter, does not contain an allegation

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that is in any sense ambiguous. As I view the case, it would have been an abuse of discretion for the court to have vacated the order directing that judgment be entered for plaintiff in order to permit defendants, by amendment, to clear up an ambiguity that existed only in the imagination of counsel. Moreover, defendants did not suggest or point out to the court wherein they claimed that the answer "may be a *little* ambiguous."

Since the foregoing was drafted, the Chief Justice has written an opinion concurring in the conclusions reached by Mr. Justice Frick. As the Chief Justice seems to have overlooked or treated as immaterial an element in the proceedings pertaining to the offer to amend which I regard as of vital importance, I shall at the risk of being prolix in the matter, make some further observations and again invite attention to the request for permission to amend and the ruling of the trial court thereon. The answer was filed May 6, 1913. On January 31, 1914, nearly nine months after the issues were made up, the case was called for trial. Defendants therefore had ample opportunity to consider the sufficiency of their answer and to prepare and tender any amendments they might deem necessary. Plaintiff moved the court for judgment on the pleadings. The record shows that this motion was argued by counsel for the respective parties. Defendants were therefore advised of the grounds upon which the motion was based and had an opportunity to move the court for permission to amend their answer before a ruling was had on the motion. It seems that they preferred to stand on their answer as framed and take the judgment of the court as to its sufficiency. The motion was properly presented and submitted, and the court was called upon to make a ruling thereon, which it did by granting the motion. For the court to have denied the motion in the face of the admissions and affirmative allegations contained in the answer would have been, as I view the case, a most flagrant and inexcusable error. As I have pointed out, every fact necessary for plaintiff to establish to entitle him to a judgment is either admitted or alleged in the answer. Therefore why go through the empty formality of requiring



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plaintiff to prove that which the defendants, under the high sanctions of an oath, have admitted and alleged? No authority can be found that even countenances, much less requires, such a vain and useless proceeding. This court in the case of *Utah Ass'n of Creditmen v. Bowman*, 38 Utah 326, 113 Pac. 63, Ann. Cas. 1913B, 334, held that default in an action by a defendant, who was duly and regularly served with summons, is "tantamount to an admission that the plaintiff is entitled to a judgment as prayed for by him." And it is further held in that case that the judge—the court—cannot compel the plaintiff, who has taken a default as provided by statute, to introduce evidence in support of the allegations of his complaint. If this is good law and sound doctrine, and it must be accepted as such in this jurisdiction, why may not the court, in an action where defendant files his verified answer in which, as in the case at bar, he admits and alleges the facts necessary for plaintiff to prove, in order for him to maintain his action, render judgment on the pleadings? This question will admit of but one answer. Under such circumstances, the court has not only the power, but it is its duty, when its power in that regard is invoked, to render judgment on the pleadings.

In the case of *Stratton's Ind. v. Dines*, 133 Fed. 449, 68 C. C. A. 161, the rule as declared by the great weight of authority is tersely illustrated as follows:

"If, on all the pleadings, taken together, defendants were entitled to judgment, a practice resulting only in such a judgment cannot be substantially wrong. In such circumstances, motion for judgment on the pleadings is a useful and recognized practice."

In *Humboldt Min. Co. v. American Mfg. M. & M. Co.*, 62 Fed. 356, 10 C. C. A. 415, the court says:

"It would seem to be absurd that when, upon the statements of the parties to the pleadings, one or the other is entitled to judgment, the court should go through the useless ceremony of submitting to a jury immaterial issues in order to enter judgment upon the pleadings without regard to the verdict."

Likewise in *Steinhauer v. Colmar*, 11 Colo. 494, 55 Pac. 291, it is said:

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"If the defendant should answer, admitting all the allegations of the complaint, judgment would go against him without trial, because he confessed the plaintiff's right to a judgment. The judgment would be a judgment on the merits, but it also would be a judgment on the pleadings." 23 Cyc. 731; 11 Ency. Pl. & Pr. 1030.

See, also, case cited in note, p. 1032.

Again recurring to the offer to amend: It will be seen by referring to the record that the proposed amendment related to matters of form only, and it would not, if it had been allowed, have changed or in any way affected the answer as to matters of substance. The motion to amend consists of several disconnected statements of counsel, and, when stripped of all verbiage, it is as follows:

"We make a motion, if the court please, to amend the answer. \* \* \* There are some allegations \* \* \* that *may be a little ambiguous.*"

This is a clear and succinct statement of the character of the amendment defendants desired to make, and it is the only amendment offered or proposed. It is suggested that this is a "somewhat strained" construction of the language used by counsel in their motion. It is not a construction of the language at all. It is the language used, and it is so plain, simple, and direct in its terms that there is nothing to construe. In order to give the motion any meaning other than its terms, as I have set them out, imply, it will be necessary to read into the record something that it does not contain. I submit there is not a paragraph, sentence, or phrase in the entire record that can be warped or tortured so as to suggest or imply that defendants desired to amend their answer in any particular other than the one mentioned. This is the portion of the record which the Chief Justice seems to have overlooked or regarded as unimportant. Assuming, for the sake of argument, that because counsel for plaintiff, in making objections to the granting of the motion, stated that "it came too late," and that there was "nothing to amend," the court probably based its ruling on one or both of these grounds. It does not follow from this that the ruling was error. No reason was given, nor was the court required to give any, for its ruling. Therefore the theory that the court may have

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had in mind for making the order denying the motion is of no consequence. The question here to be determined is: Were the defendants entitled, as a matter of right, under the circumstances, to the amendment which they, speaking through their counsel, informed the court they desired to make, and did the court err in denying the motion?

While the answer, which was before the court, contains, as stated, much irrelevant and redundant matter, it does not, however, contain an allegation that is in any sense ambiguous. An amendment in that regard would have been a vain and useless thing. In 1 Ency. Pl. & Pr. 523, it is said:

"The court may properly refuse to allow an amendment which is immaterial, unnecessary, or indefinite, or which will not accomplish the purpose for which it is intended." 31 Cyc. 370.

Counsel for defendants have filed two elaborate briefs in the case, and in neither of them have they pointed out wherein they claim the answer is ambiguous. While they have, in general terms, mentioned the motion to amend, they have not discussed the amendment they desired to make. They have not even mentioned the alleged ambiguity which they desired to cure by amendment. In fact, the term "ambiguity" or its equivalent does not appear at all in their briefs. And they nowhere in their briefs point out or suggest any other defect or infirmity in their answer that they desired or now desire to cure by amendment. This court is not advised wherein defendants claim that the answer is susceptible of being amended as to substance. For aught that appears in the record or in the briefs of counsel, the controversy on the part of defendants, so far as it involves the question of amendment, may be for delay only. Defendants, under Rule 10 of this court, are not entitled, as a matter of right, to have the question of amendment reviewed or considered. I am also inclined to the opinion that, under the decisions of this court, they are deemed to have abandoned this particular assignment. *State v. Riley*, 41 Utah. 241, 126 Pac. 294. Let that be as it may, their failure to discuss the subject-matter of the proposed amendment—the alleged ambiguity—in their briefs is at least somewhat persuasive that they regard the question

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as unimportant and without merit. It is suggested that it "is not fair to the record to treat it as abandoned." If my position on this point is unfair, it necessarily follows that Rule 10 promulgated by this court, and adhered to by it in former decisions, is unfair. I fail, however, to comprehend the philosophy or the justice in holding that the rule is sound and wholesome when invoked and applied in a case where the life of a human being is at stake but "unfair" when invoked and applied in a proceeding where, as in the case at bar, a party is seeking to avoid the payment of a debt which, according to his own version and admissions, made under oath, concerning the transaction out of which the debt arose, is a just, legal and binding obligation. The fact that the question of amendment "is noticed in the prevailing opinion, and the case largely ruled on it," proves nothing, except that the rule is not invoked or applied in this case.

Defendants' discussion of the case is mainly devoted to the question of whether the answer tenders an issue entitling them to a trial on the merits and to the contention that the plaintiff should be required to account to them for a portion of the interest paid on the \$2,500 involved, and for the monthly salary he received for his services during the four years he was in their employ, and that the money thus paid him should offset the \$2,500 for which the action is brought. This last proposition is, under the admitted facts, so repugnant to my ideas of justice, and is so at variance with the elementary rules of law governing contracts of this kind, and, in my opinion, so utterly void of merit, I would not discuss it, were it not for the fact that the prevailing opinions seem to hold that an accounting may be had between the parties along these lines. As I view the case, it would be no more of a departure from well-established principles of law and justice to hold that a party who has money on deposit in a savings bank or loans money at a legal rate of interest must, when he seeks to withdraw his money from the bank or to collect the money loaned, "do equity" by tendering the bank or the borrower, as the case may be, the interest paid him for the use of his money or by discounting the principal in a sum equal to the interest paid, than it would to hold that, before plaintiff in

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this case will be permitted to recover for the \$2,500 in question, he must "do equity" by tendering to defendants the interest, or any part thereof, paid for the use of the money. The parties, so long as they did business under and in pursuance of the contract, were, of course, bound by its terms. The contract, which, as stated, is made a part of the answer, provided that plaintiff should receive a stipulated monthly salary for his services and interest at the rate of twelve per cent. per annum on the \$2,500. Defendants allege in their answer that they "performed all the conditions of said contract on their part to be performed and have paid the salary and interest stipulated," and that plaintiff "left said service at the end of four years without the consent of plaintiff (defendants)," and in their prayer they ask "that the plaintiff take nothing by his complaint, and that it be dismissed." The pleadings, therefore, show that there was a settlement between these parties once each month on the question of services and salary, and at least once each year on the question—payment—of interest on the \$2,500, for a period of four years. The plaintiff performed the services, and the defendants paid him the stipulated salary, and also paid him twelve per cent. interest per annum for the use of the \$2,500. Plaintiff terminated the contract at the end of four years and demanded payment of the \$2,500. Defendants refused to pay him the money or any part thereof. Defendants are demanding that the \$2,500 be forfeited to them, not because plaintiff in any respect or on any occasion breached the contract, but because he terminated the contract, which he had a legal right to do, and refused to continue in their service. This is all there is to the case.

Again referring to the question of whether an accounting should be had between these parties, I invite attention to the printed brief of defendants, wherein they say:

"The respondent performed the services and received the salary prescribed in the contract. Appellants have the services and respondent has the salary."

Now, if plaintiff performed the services required of him under the contract (and we have the statement of defendants both in the verified answer and in their briefs that he did

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perform them), under what rule of law or principle of equity or justice may he be compelled to account to the defendants for the money, or any part thereof, that they have paid him as salary for such services? I venture the statement that there is not an authority, except the two prevailing opinions in this case, that supports the contention of defendants in that regard. Moreover, the question of accounting is not raised or presented by the pleadings. No facts are alleged in either the complaint or answer upon which an accounting could be had, and such proceeding is neither contemplated nor asked for. The briefs of defendants, not the pleadings, are looked to as a basis for an accounting, should one be had. For the purpose of illustration, let us assume that legal and equitable principles are to be brushed aside in the case, and the business transactions between these parties, including the services rendered defendants by plaintiff, a settlement of which, the record shows, was had once each month during a period of four years, are reopened and thrown at large for readjustment and settlement. And on the accounting the preponderance of the evidence should show that the value of the plaintiff's services did not exceed fifty dollars per month during the time of his employment. It would necessarily follow that the court would be obliged to render judgment requiring plaintiff to account to defendants for the money paid him in excess of fifty dollars per month during the four years he was in their service. And, on the other hand, if plaintiff should prove by the greater weight of the evidence that the services he rendered defendants were actually worth \$200 per month more than the salary paid him by defendants under the contract, he would be entitled to a judgment against defendants for \$9,600 in addition to the amount directly involved in the suit. The mere suggestions of such a monstrous proposition ought to shock the conscience of any court. It may be said that these illustrations and deductions are unreasonable and somewhat far-fetched. They are, nevertheless, within the range of probabilities. Defendants, in their briefs, with much sarcasm, mingled with irony and ridicule, refer to plaintiff's ability, experience, and standing as a lawyer in belittling and contemptuous terms, and in their answer

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they allege that they have "paid plaintiff far in excess of what, by reason of plaintiff's negligence and inattention to business, his services were worth to defendants." If what they say in that regard correctly reflects plaintiff's ability, efficiency, and character as a lawyer, it might not be a difficult matter for them to prove that a salary of fifty dollars per month was all, if not more, than his services were worth. On the other hand, defendants allege in their answer, referring to the magnitude of their legal business, that from the year 1901 to and including the year 1912 they paid in court costs alone \$79,322.94; that during this period of time the net profits (all of which went to defendant Francis G. Luke) were \$111,734.64. This alone tends to show that during the time plaintiff was in their employ they were engaged in much litigation. Plaintiff, therefore, might be able to show that his services were actually worth much more than the salary paid him by defendants. Let that be as it may, I submit that, to direct that an accounting be had between these parties along these lines, and on such accounting to compel either party to pay any sum of money to the other, would, in effect, as I view the case and understand the principles of law bearing thereon, be depriving a person of property, not by "due process of law," but in violation of law.

It is also suggested that the action was brought and relief asked for on one theory, and that the judgment is sought to be upheld on another and different theory, and for that reason the judgment cannot be maintained. The theory on which judgment was rendered, and the ground upon which plaintiff insists that it should be upheld, is that defendants admitted, and in their answer alleged, every fact which it otherwise would have been necessary for plaintiff to prove to entitle him to a judgment. While there is a general mingling and blending of legal and equitable propositions in the complaint, it nevertheless states a cause of action. And in view of the peculiar contractual and business relations of the parties, as shown by the admitted facts, I am not prepared to say that the complaint is defective in form. The mere fact that plaintiff has set forth in his complaint both legal and equitable grounds as a basis for the relief sought, and that the judg-

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ment was rendered on the legal grounds only, cannot prejudice his case without offending against Section 19 of Article 8 of the Constitution of this state, which provides:

“There shall be but one form of civil action, and law and equity may be administered in the same action.”

Assuming, for the purpose of this case, that the complaint is open to the objections urged against it, these defects are cured by the affirmative allegations of the answer; that is, the material allegations of the complaint considered in connection with the allegations of the answer are sufficient to uphold the judgment. It is a well-recognized rule of practice that a defective complaint may be supplemented and cured by the allegations of the answer. In Pomeroy's Code Rem., Section 470, the author says:

“A defective complaint or petition may be supplemented, and substantial issues may thus be presented by the answer itself! When the plaintiff has failed to state material facts, so that no cause of action is set forth, but these very facts are supplied by averments in the answer, the omission is immaterial, and the defect is cured.”

In *Chesney v. Chesney*, 33 Utah 503, 94 Pac. 989, 14 Ann. Cas. 835, a somewhat recent case, Mr. Justice Frick, speaking for the court, says:

“As to whether a judgment is supported by the pleadings depends, not upon the allegations of the complaint alone but upon a reasonable construction of all the pleadings when considered together.”

And again:

“In other words, if there be a defect of substance in the complaint, by reason of which no cause of action is stated, and the answer supplies this defect, the defendant may not avail himself of the defect in the complaint after verdict and judgment.”

In *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. 959, 29 L. Ed. 212, the court says:

“Courts of equity are frequently required to act on the admissions of the answer without other proof. Thus, when a cause is heard upon bill and answer, the decree is based entirely on the admissions of the answer without other testimony. (Citing cases.) At all events, it does not lie in the mouth of a defendant in equity to complain that the court assumed his answer made under oath to be true and decreed accordingly.”



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And again, in the same opinion:

"If there was any defect in the statement made in the bill, it was rendered immaterial by the statements of the answer, and is not now ground of complaint." *Pindall v. Trevor*, 30 Ark. 250; *Richardson v. Greene*, 61 Fed. 423, 9 C. C. A. 565; *Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397; Bliss, Code Pl. 437; 1 Ency. Pl. & Pr. 915.

Unless legal principles are swept aside in this case, and the question of services rendered defendants by plaintiff and the monthly salary paid therefor is to be reopened and an accounting had between these parties respecting these matters, and all transactions involved therein covering a period of four years, it is evident that plaintiff cannot, under the prevailing opinions, ultimately recover anything in the action, because it necessarily follows that, if he is not entitled to judgment on a given states of facts when such facts are alleged and admitted in the answer to be true, he would not be entitled to judgment if he should go through the formality of establishing those facts by the introduction of evidence. To illustrate: Suppose that, when the case is called for trial, plaintiff shall product evidence showing: (1) That the five shares of stock he received from the defendants were of no appreciable value, and were not intended to and did not make him a stockholder of the Merchants' Protective Association, and that the true and real consideration for the \$2,500 he advanced or turned over to defendants was the twelve per cent. interest per annum which they agreed to pay him for the use of the money; (2) that he terminated the contract under which the transactions were had, demanded of the defendants payment of the \$2,500 and the interest due thereon. Defendants in their answer allege: "*That such stock was of small or no intrinsic value*"; that the purchase of the same by plaintiff was not intended "in any wise to make him a partner in the business," and that he "was not and would not be directly interested in the business \* \* \* or in the profits of the same," and that plaintiff "accepted the personal covenants of the defendants to pay him \* \* \* the interest on the \$2,500 so invested (loaned) by the plaintiff"; (2) and that "plaintiff \* \* \* left said service (terminated the con-

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tract) at the end of four years without the consent of the plaintiff (defendants)." It will thus be observed that the defendants have admitted—affirmatively alleged—all the material facts that plaintiff could prove under the allegations of the complaint and of the answer. Therefore, if he is not entitled to judgment on the facts admitted, it logically follows that the proof of those facts would not entitle him to judgment. It is therefore plain that under the law of the case, as declared by the prevailing opinions, plaintiff must ultimately forfeit to defendants the \$2,500 which they say in their brief was "*in the nature of a loan*," and for which he has received no consideration whatever, except the interest paid thereon for four years only.

For the reasons stated, I am clearly of the opinion that the judgment should be affirmed; but since plaintiff, under the law of the case, as declared by the prevailing opinions, has no rights in this controversy that the law will recognize and enforce, I think that, when the case is remanded, the trial court should be directed to enter an order dismissing the action, and thereby end the litigation.

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## SALT LAKE CITY v. WILSON.

No. 2675. Decided April 2, 1915 (148 Pac. 1104).

1. **TAXATION—POLL TAX—VALIDITY OF STATUTE—UNIFORMITY—LIMITATION.** Const. art. 1, section 24, providing that all laws of a general nature shall have uniform operation, and article 13, section 3, providing that taxation shall be uniform and regulated by general law, do not apply to road poll taxes; and hence Laws 1909, chapter 118, section 6, which provides for an annual road poll tax of two dollars, to be collected and expended in cities under such regulations as may be prescribed by ordinance, is not violative thereof, though the privilege given by former legislation of performing labor in lieu of paying the tax is eliminated. (Page 64.)
2. **HIGHWAYS—POLL TAX—POWER TO IMPOSE.** The imposition of a road poll tax, being in the nature of a police regulation, is within the police powers of the state, but the state is limited within reasonable bounds in the application and enforcement of this power. (Page 67.)
3. **CONSTITUTIONAL LAW—HIGHWAYS—POLL TAX—VALIDITY OF STATUTE—EQUAL RIGHTS AND PRIVILEGES.** LAWS 1909, c. 118, sec. 6, prescribing an annual road poll tax of two dollars, is not violative of Const. art. 4, sec. 1, providing that both male and female citizens shall enjoy equally all civil, political and religious rights and privileges, though the poll tax is imposed only on men. (Page 68.)
4. **STATUTES—SUBJECT-MATTER—ROAD POLL TAX—VALIDITY OF STATUTE.** Laws 1909, c. 118, defining the powers of the county commissioners as to roads, providing for the appointment of a county road commissioner and prescribing his duties, providing an annual road poll tax and specifying who shall be liable therefor, and the manner of collecting and expending same within and outside of cities and towns, and repealing and incorporating Comp. Laws 1907, tit. 30, c. 2 (sections 1134-1138), and also title 64 (sections 1743-1751), is not violative of Const. art. 6, section 23, providing that no bill shall contain more than one subject, no new legislation or material change in the existing road law being attempted, and the matters contained in title 30, c. 2, and in title 64, not being so foreign to each other as to prevent them from being incorporated in one act, though the former relates to commissioners and supervisors of highways, and the latter

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relates to road poll taxes, and it being immaterial that the subject of cities and towns was treated in title 13 (sections 169-313x2).<sup>1</sup> (Page 70.)

5. **STATUTES—SUBJECT-MATTER—AMENDATORY STATUTE.** Under Const. art. 6, section 23, providing that no bill shall contain more than one subject, anything may be incorporated in an amendment to a statute which would have been germane, or would have directly related to the subject-matter of the original statute, or which could properly have been included therein. (Page 70.)
6. **STATUTES—SUBJECT-MATTER—CONSTRUCTION OF CONSTITUTIONAL PROVISION.** While Const. art. 6, section 23, provides that a bill shall not contain more than one subject, is mandatory, and should be so applied as to effectuate its purpose in preventing the combination of incongruous subjects, neither of which could be passed when standing alone, it should be liberally construed in favor of upholding the law, and with a consideration of the fact that it was aimed at new legislation rather than at consolidations and codifications.<sup>2</sup> (Page 72.)
7. **CONSTITUTIONAL LAW—PROVINCE OF COURTS—INJUSTICE OF STATUTE.** That a statute prescribing a road poll tax may be unjust does not authorize the courts to declare it invalid. (Page 73.)

Appeal from District Court, Third District; Hon. *F. C. Loofbourow*, Judge.

Action by Salt Lake City, a municipal corporation, against *M. E. Wilson*.

Judgment for defendant. Plaintiff appeals.

Reversed and Remanded, with directions.

*H. J. Dininny*, City Atty., *Aaron Myers* and *W. H. Foland*, Asst. City Attys., for appellant.

*M. E. Wilson* for respondent.

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<sup>1</sup>*Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *Marionaux v. Cutler*, 32 Utah, 486, 91 Pac. 355.

<sup>2</sup>*Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367.

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FRICK, J.

Salt Lake City, hereafter called appellant, commenced this action in the City Court of Salt Lake City against the defendant to recover a road poll tax amounting to two dollars. The action was based upon a city ordinance, which was approved June 15, 1909. The ordinance in question was adopted pursuant to Chapter 118, Laws Utah 1909, which was approved March 23, 1909, and went into effect May 12th of that year. The ordinance is fully set forth in the complaint, together with the notice that was served on the defendant by the "street supervisor" of Salt Lake City. The defendant demurred to the complaint upon the ground "that it did not state facts sufficient to constitute a cause of action." He assailed both the ordinance and said Chapter 118 as being unconstitutional and therefore void. Defendant supplemented his general demurrer by specifically enumerating the grounds which he contended vitiated Chapter 118 and the ordinance aforesaid. The City Court duly certified the action to the District Court of Salt Lake County where, after a hearing upon the demurrer, it was sustained. The appellant elected to stand upon its complaint, whereupon the District Court entered judgment dismissing the action, and hence this appeal.

In view that the title of the act in question is also assailed upon the ground of duplicity, we quote it in full:

"An act defining powers of county commissioners as to roads; appointing county road commissioner, defining his duties, providing an annual road poll tax; specifying who shall be liable and manner of collecting and expending the same, repealing Chapter 2, Title 30, and also Title 64, compiled Laws of Utah, 1907."

Section 1 of the act is divided into six separate divisions. In the first the county commissioners of the several counties of this state are required to appoint biennially a county road commissioner, to fix his compensation and to remove him for cause. In the divisions following are defined the powers and duties of the county commissioners respecting the platting, abolishing, maintaining, and improving the public roads of the several counties. Section 2 provides that a record be kept

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by the county clerks of all orders and proceedings of the county commissioners respecting the public roads. Sections 3 and 4 define the powers and duties of the county road commissioner, among which are that he serve notice on persons who, under the law, are "liable to the payment of road poll tax" and to collect said "road poll tax." Section 5 provides that the county commissioners may require special reports from the county road commissioners at any time. Section 6, which is the section that is more particularly assailed by the defendant, so far as material here, reads as follows:

"Two dollars lawful money is an annual road poll tax upon every man over twenty-one and under fifty years of age, not physically incapacitated to work and not exempted by law. Within incorporated cities or towns, said road poll tax may be collected and expended under such regulations as may be by the city ordinance prescribed in road improvements."

Section 7 provides for the collection of the road poll tax in the county at large by the county road commissioner. Section 8 prescribes a penalty for failure to pay the road poll tax. Section 9 requires the county road commissioner to prepare a list of the names and addresses of all persons subject to pay the road poll tax outside of cities and towns. Sections 10 and 11 provide who shall be exempt and how the fact of exemption shall be ascertained and certified. The exemptions are such as are usual in such laws, namely, volunteer firemen and officers, musicians and members of the National Guard, etc.

The constitutionality of the act is assailed on the following grounds: (1) That it offends against Article 1, Section 24, of our Constitution, which reads as follows: "All laws of a general nature shall have uniform operation." (2) That it also violates Article 4, Section 1 of that instrument, which provides:

"The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall enjoy equally all civil, political and religious rights and privileges."

(3) That it is contrary to Article 13, Section 3, which in substance, provides that the Legislature shall provide for a uniform and equal rate of assessment and taxation, and shall,

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by general law, provide such regulations as shall secure a just valuation for taxation of all property, "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." (4) That it is violative of Article 6, Section 23, which reads as follows:

"Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

There are other constitutional provisions referred to in connection with the foregoing, but they have no special application here.

In order to obtain a more comprehensive view of the legal questions involved we shall give a brief history of the so-called road poll tax law as the same has been in force in the Territory and State of Utah for many years. 1 Chapter 118, as it now stands, is composed of Chapter 2, Title 30, and of Title 64 of the Laws of Utah 1907. Chapter 2, Title 30, comprised Sections 1134 to 1138, inclusive, of said Compiled Laws, and Title 64 was composed of Sections 1744 to 1751, inclusive, of said compilation. Sections 1134 to 1138 are likewise found in the Revised Statutes of Utah of 1898, by the same numbers, and Sections 1744 to 1751 are also contained in that revision, under the same numbers, and are there designated as Title 53. Much that is contained in all of Sections 1134 to 1138 and Sections 1744 to 1751 is also found in Comp. Laws Utah 1888, Sections 2065 to 2092, inclusive. Section 2077 of that compilation is, in its terms, quite similar to Section 6 of Chapter 118, which is the section in question here. Indeed, the language referring to cities and towns is practically the same as in Section 6. It is as follows:

"Within incorporated towns or cities said poll tax may be collected under such regulations as may be by the ordinance provided and be used by said towns or cities for improving" the streets.

Sections similar to 1744-1751 are found in Comp. Laws Utah 1876, p. 165. It is there made to appear that the first poll tax law in force in the Territory of Utah was approved on the 16th day of January, 1862, and by referring to the

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several compilations and revisions of the laws of the Territory and State of Utah it will be found that practically the same law respecting the payment of a road poll tax that is now in force has been in force for more than 50 years, the only difference being that those who were subject to the tax could perform two days' labor or, under the laws of 1876, pay \$1.50 in cash, while under the laws of 1888 they were required to perform two days' labor or pay three dollars in cash. Such continued to be the law until Chapter 118 was passed, when the amount was reduced to two dollars payable in money. There is, therefore, nothing that is really new in Chapter 118. The chapter, in effect, is merely a consolidation of Sections 1134-1138, which composed Chapter 2 of Title 30 and Sections 1744-1751 which composed Title 64 of the Comp. Laws 1907, with such changes, modifications and additions as the development of the public roads and changes in the government thereof and the laws generally would naturally bring about. That part which relates to the road poll tax is, however, practically the same, except that the amount is reduced from three dollars to two dollars and the duty of performing labor is eliminated. It is the latter change or feature, however, of Chapter 118 that the defendant seems to think changes the nature or character of the road poll tax from a police regulation to a tax proper. That such is his contention is made apparent by reference to page 6 of his brief, where he says:

"At the outset it should be remembered that we are not dealing with a statute relative to a highway assessment payable in labor, but we are dealing with a statute requiring the payment of money only, a state capitation or poll tax."

It is as manifest from the law itself as it could well be made that the present road poll tax is precisely what it always has been in this state, namely, an imposition in the nature of a police regulation, not a tax in the sense that taxes are spoken of in our Constitution and statutes when the subject of general taxation is under consideration. The only case that we have been able to find (*Hassett v. Walls*, 9 Nev. 387) which supports defendant's theory that the road poll tax is



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a tax as that term is generally applied makes no distinction whatever between a so-called poll tax that may be discharged by performing labor and one that is payable in money. Nor is such a distinction made in the numerous cases in which it is held that road or highway poll taxes do not come within the general purview of the constitutional and statutory provisions relating to general taxation. In the case of *East Portland v. County of Multnomah*, 6 Or. 62, a highway poll tax was required to be paid in cash under a statute similar to Section 6 of Chapter 118. The statute in that case was assailed on the same grounds that Section 6 is assailed, but the Supreme Court of Oregon held that such a road poll tax did not come within the constitutional provisions relating to general taxation. That case was approved and followed by the same court in *Multnomah County v. Sliker*, 10 Or. 65. The Supreme Court of Kansas in *Re Dassler*, 35 Kan. 684, 12 Pac. 134, in discussing the nature or character of such a poll tax, says:

"The power to impose labor for the repair of public highways and streets has been exercised from time immemorial, and comes within the police regulation of the state or city. A commutation of such labor in money in lieu of work, while in the nature of a tax, is not in common speech or in customary revenue legislation, understood as embraced in the term tax. The power to impose this labor is exercised for public purposes, and the general good and convenience of the community. (Citing cases.) There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto; among these services are labor on the streets or highways, and training in the militia."

It accordingly is held by practically all authorities that such a road poll tax does not come within the uniformity clause of the Constitution relating to general taxation, and that it is not a property tax nor a poll or capitation tax as that term is generally understood and applied by the courts. Upon this question see *Tekoa v. Kelly*, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. (N. S.) 901, and note; *Shane v. City of Hutchinson*, 88 Kan. 188, 127 Pac. 606; *City of Faribault v. Misener*, 20 Minn. 396 (Gil. 347); *Sawyer v. City of Alton*, 4 Ill. (3 Scam.) 127; *Pleasant v. Kost*, 29 Ill. 490; *Fox v. Rockford*, 38 Ill. 451; *Macomb v. Twaddle* (Bradwell), 4 Ill.

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App. 254; *Short v. State*, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404; *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351, 87 Pac. 634, 9 L. R. A. (N. S.) 306, 12 Ann. Cas. 314; *State v. City of Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; *The Town of Tipton v. Norman*, 72 Mo. 381; *State v. Rayburn*, 2 Okl. Cr. 413, 101 Pac. 1029, 22 L. R. A. (N. S.) 1067, Ann. Cas. 1912A, 733; *Galloway v. Tavares*, 37 Fla. 58, 19 South. 170; Elliott on Roads and Streets (3d Ed.), Sections 479-480; Cooley on Taxation (3d Ed.) 16. In the foregoing cases the contentions of the defendant are fully discussed and in all of them it is held that the uniformity clause of the Constitution and the provisions relating to general taxation have no application to a road poll tax. In *Tekoa v. Reilly*, *supra*, the Supreme Court of Washington overruled the case of *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 67 L. R. A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634, where a different conclusion had been reached. In *Thurston County v. Tenino Stone Quarries*, *supra*, the question of exempting women is fully and learnedly discussed. In many of the cases cited above, the question of exemption is discussed and decided contrary to defendant's contentions.

Defendant's contention that if the state can require the payment of two dollars it may compel the payment of any number of dollars is also fully considered by the Supreme Court of Kansas in *Re Dassler*, *supra*. It is there stated that it is not necessary to determine that question until the state attempts to impose unreasonable burdens in 2 that respect. As we have seen, the imposition of a road poll tax is in the nature of a police regulation and thus within the police powers of the state. While the limitations of such a power are not always easily stated or defined, yet it is quite as clear that the state is limited in the application and enforcement of the power within reasonable bounds as it is certain that the power exists. If the state, therefore, imposes an unreasonable burden in the form of a labor or cash poll tax, the courts, we think, would have no difficulty in keeping such a law within reasonable bounds the same as any other police regulation must be kept. The amount of the imposition by our laws as well as by those imposed by other

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states, clearly shows that there is not the slightest danger nor inclination on the part of the several states that they will impose an unusual burden upon the citizen.

The defendant, however, further contends that our Constitution is broader with respect to the rights and privileges that are enjoyed by the sexes than are the provisions of the Constitutions of the several states whose decisions we have referred to, and hence it is contended 3 those cases are not controlling here. As we have seen, our Constitution provides:

“The rights of citizens of the State of Utah to vote and to hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall enjoy equally all civil, political and religious rights and privileges.”

We confess our inability to see anything in the foregoing quotation which prevents a reasonable classification of the citizens of the state with regard to the performance of certain duties which may be required by the state under its police power. Why should not women be exempt from the performance of some duties which are imposed on men? Surely one need not at this day and age point out the physical differences that exist between the sexes, nor dwell upon the reasons why females, in the nature of things, cannot respond to all the demands of the state. To perform labor on the public roads or streets, or to pay the sum of two dollars for the purpose of improving them, is neither a political, religious, or other civil right or privilege. Nor does it fall within the right or privilege of exercising the franchise or of holding an office. It is not likely that females will ever compete with the males for the office of county road commissioner or for any office relating to the public roads. But in practice the imposition and payment of a road poll tax by women would, in the long run, and in a large measure at least, merely add an additional burden on a large number of men, and thus, instead of bringing about uniformity of burdens, would tend to the opposite result. It is a matter of general knowledge that man, during his active career, is the breadwinner for the family, and that upon him must fall the direct burden of discharging the public duties, and especially so when physical exertion and

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strength are required. Now, to the ordinary married man, it would be utterly immaterial whether two days' labor or two dollars in money were required by the state, since he would have to perform the one or pay the other. He not only would have to pay the money, but he would have to earn it.

Entirely apart from the legal phase of the question, however, how does it benefit the married man to require his wife or his daughters to pay a road poll tax? It would only tend to place an additional burden on him without benefiting any one. Even if counsel's contentions were conceded therefore, he would not gain anything in a practical sense. Of course, such consequences would not control the principle he contends for if it were true that under the constitutional provision which he invokes women may not be put in a class by themselves. Such a classification has, however, always been made and enforced from time immemorial, and unless prohibited in express terms in the Constitution, it is a natural and proper one to make. We can discover nothing in the constitutional provision now under consideration which prohibits such a classification, and hence the contention cannot prevail. In passing this phase of the case we desire to state that after an extended search we have been able to find but one case wherein it is squarely held that a road poll tax like the one in question here is unconstitutional. There may be and perhaps are others. The case is the one before referred to, namely, *Hassett v. Walls*. No authority is cited in that case, nor is there any satisfactory reason given in support of the conclusion. All that can be said is that the Nevada Supreme Court, as then constituted, refused to be bound by the decisions of other courts upon the subject. It is but fair to state that another case is sometimes referred to as sustaining the Nevada decision, namely, *Proffit v. Anderson* (Va.), 20 S. E. 887. A mere cursory examination of that case, however, will disclose that the decision is based upon an entirely different ground. The Constitution of Virginia contained a provision that "counties and corporations shall have the power to impose a capitation tax not exceeding fifty cents per annum for all purposes." Louisa County, in that state, sought to impose an additional road poll tax, and the

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court held that the fifty cents provided for in the Constitution covered every imposition that could be made except a tax on property by valuation. The decision, therefore, can have no influence upon a question like the one before us.

The defendant, however, also contends that Chapter 118 is void because the act contains more than one subject. A careful examination of Chapter 118 will disclose that no new legislation was attempted. The principal **4, 5** change that was made in the first five sections of the old law, namely, Sections 1134 to 1138, was to provide for the appointment of one road commissioner instead of appointing several so-called road supervisors in each county biennially. The powers and duties which theretofore were vested in and imposed on the several road supervisors were, by the act, conferred and imposed on the road commissioner. All other changes in those sections merely made the act conform to the principal change we have just pointed out. The changes in the other sections, namely, Sections 1743 to 1751, are, if anything, even less radical. The principal change is contained in Section 1743, which is Section 6 of Chapter 118, and which is the section that is specially assailed. The change consists in this: Instead of requiring "two days' work of eight hours each, or, in lieu thereof, three dollars in lawful money," as the old section provided, the new one reads, "two dollars lawful money is an annual road poll tax." The other changes are again such as will make the act conform to one road commissioner instead of several road supervisors. The Legislature no doubt could have adopted a different method in making the foregoing changes had it been so advised. It could have passed an act wherein it named all of the foregoing sections and changed or amended them just as was done in the new act. The title to such an act would have been sufficient under our Constitution if it had merely mentioned the different sections which were to be amended thus: "An act to amend Sections 1134, 1135, etc., Comp. Laws Utah 1907." *Edler v. Edwards*, 34 Utah 13, 95 Pac. 367. Defendant, however, contends that the Legislature offended against the constitutional provision now under consideration in con-

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solidating Chapter 2 of Title 30 and Title 64. Upon this point, at page 14 of his brief, he says:

“Title 64 of the Laws of 1907 was one subject, namely, poll tax. The powers and duties of county commissioners was Chapter 2 of Title 30 of the Laws of 1907, relating to highways. The subject of cities and powers of city councils was another title, to wit, Title 13 of the Laws of 1907.”

It is contended, therefore, that there are three distinct subjects contained in Chapter 118. Let us pause for a moment and examine this contention. It is now settled doctrine that anything could have been incorporated into the sections as amended which would have been germane or directly related to the subject-matter of the original sections, or which could properly have been included therein originally. Upon that point we desire to call special attention to what was said in *Marionaux v. Cutler*, 32 Utah, 486, 91 Pac. 355. Reference to that case will show, we think, that the matters contained in Chapter 2 of Title 30 and Title 64, *supra*, were not so incongruous or foreign to each other as not to permit them to be incorporated into one act. What is there in the first five sections of Chapter 118 that could not have been properly included within any amendment of Sections 1134 to 1138? The powers of the county commissioners referred to in the first five sections of Chapter 118 are not as sweeping as defendant's statements would imply. They are strictly limited to matters relating to public roads and a road poll tax and the manner of its collection and disbursement. These matters are all connected with or related to each other. Are not the maintenance or improvement of public roads and the collection and disbursement of a road poll tax sufficiently related to each other to be properly included in one act? We certainly have found nothing in the decisions or laws indicating that such may not be done. After carefully considering and reflecting on the rules laid down by us in *Edler v. Edwards* and *Marionaux v. Cutler*, *supra*, we cannot see how anything that is said in the first five sections of Chapter 118 conflicts with the rules there laid down.

It is, however, further contended that Title 64, comprising

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Sections 6 to 11 of Chapter 118, covers at least two subjects: (1) The road poll tax; and (2) the conferring of powers upon cities and towns respecting its collection. 6  
If we are correct in holding that the provision respecting the imposition and collection of a road poll tax is not foreign to legislation concerning public roads and highways, then again there is nothing in the last six sections of the act which offends against the constitutional provision in question. The objection is therefore limited to the fact that the Legislature consolidated Chapter 2 of Title 30 and Title 64 as aforesaid. We have already attempted to show that there is nothing contained in the first five sections of Chapter 118 which could not properly have been included in one amendatory act. Now, what is there in the last six sections of that chapter that could not have been properly included in the same amendatory act? Surely there is nothing, except it be the provision that permits cities and towns to collect and expend the poll tax on "road improvements." If in amending or in consolidating acts of the Legislature a rule as strict as the defendant contends for shall be enforced, then the subjects of legislation will be indefinitely increased. If the matter objected to had not before been treated in different chapters of the Compiled Laws, we do not think that any one would seriously contend that Chapter 118 contained more than one subject under the liberal rule of construction applied by the courts. The mere fact, therefore, that the subject-matter of Chapter 118 was treated in different chapters or different titles is, under the circumstances, not even persuasive that there is more than one legislative subject contained in the act. It often happens that two, and even more, independent acts are passed the whole subject-matter of which could properly have been embraced within one act. Consolidation of acts, therefore, standing alone, is of little, if any, importance upon the question of plurality of subjects. As we pointed out in *Edler v. Edwards, supra*, that while the constitutional provision now under consideration is mandatory and binding alike upon the courts and the Legislature, yet it should be liberally construed in favor of upholding a law, and should be so applied as to effectuate its purpose in preventing the combi-

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nation of incongruous subjects neither of which could be passed when standing alone. A too strict application of the provision might, however, result in hampering wholesome legislation upon any comprehensive subject rather than in preventing evils. Moreover, a mere reading of our constitutional provision shows that it was aimed at new legislation rather than at consolidations and codifications. By this we do not mean that the Legislature may consolidate any existing acts regardless of whether the matters therein contained are related or germane or not; but what we mean is that the object and purpose of the provision was aimed at new legislation rather than to prevent mere trifling changes and amendments of existing laws. In view of this, and in view of the consequences that may, and usually do, follow from declaring laws void that have been enforced for a generation or more, courts cannot exercise too much care and prudence in passing upon such questions. The cases upon this subject are collated and cited in appellant's brief, and we shall do no more than to refer thereto.

Much is said in defendant's brief concerning the injustice of a road poll tax. If we were in entire accord with counsel's contentions in that regard, it still would be of no consequence here. To cure defects in or to repeal bad laws is a legislative, not a judicial, function. A legislative repeal of a law merely arrests its further effect, while to judicially declare it void may be fraught with consequences that no one can foresee. Moreover, to declare laws invalid upon the ground of plurality of subjects may establish a precedent which might effect or at least create doubt respecting the validity of other laws, and that is another reason why courts are slow to strike down a legislative act. In our judgment the plurality of the act in question is not so clearly established as to authorize us to declare it void. Nor do we, for the reasons herein stated, consider the act vulnerable to the other objections.

The judgment is therefore reversed and the cause is remanded to the District Court of Salt Lake County, with directions to overrule the demurrer and to proceed with the case in the usual course.

STRAUP, C. J., and McCARTY, J., concur.



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State v. Benson, 46 Utah 74.

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## STATE v. BENSON.

No. 2615. Decided April 8, 1915 (148 Pac. 445).

1. **RAPE—STATUTORY RAPE—"ATTEMPT"—INDICTMENT—STATEMENT OF PARTICULAR ACTS.** In a prosecution for assault upon a female of fifteen with intent to have carnal knowledge, under Comp. Laws 1907, section 4221, providing that any person who shall carnally know any female between thirteen and eighteen years of age shall be guilty of a felony, and under section 4495, providing that any act done with intent to commit a crime, but failing to effect its purpose, is an "attempt" to commit a crime, where the indictment alleged that defendant "did lay hold upon the person of said \* \* \* and threw her to the ground," etc., such indictment was not improper as embodying unnecessary allegations calculated to prejudice the jury, as the evidence substantiated the allegations.<sup>1</sup> (Page 76.)
2. **CRIMINAL LAW—DEMONSTRATIVE EVIDENCE—CLOTHING.** In a prosecution for assault upon a female of fifteen with intent to have carnal knowledge, a skirt worn by prosecutrix at time of the assault, which she testified the defendant had torn, although it had been washed and worn subsequently, was properly admitted in evidence to show the extent of the tear as indicative of violence. (Page 77.)
3. **CRIMINAL LAW—PROVINCE OF JURY—WEIGHT OF EVIDENCE.** The weight of evidence is for the jury. (Page 77.)
4. **WITNESSES—IMPEACHMENT—CONTRADICTION.** In a prosecution for assault with intent to have carnal knowledge where the state produced the mother of the prosecutrix as a witness, she not testifying as to a certain conversation with defendant, who, however, being asked, testified on cross-examination that he had a conversation with the woman, but denied that he had made the statements attributed to him, she being then called in rebuttal, and contradicting him, the introduction of her testimony in rebuttal as tending to impeach the defendant, proper foundation therefor having been laid, was proper, since the statements which were denied might have been introduced in evidence against him as part of her evidence in chief; a party's declarations against interest, being admissible as independent evidence against him, may be shown without first calling them

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<sup>1</sup>*Distinguishing State v. Evans*, 27 Utah, 12, 73 Pac. 1047; *State v. Williamson*, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

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to his attention, although they also tend to discredit him by reason of inconsistency with his testimony, while the evidence, being properly before the jury, may be considered as affecting his credibility. (Page 78.)

5. **WITNESSES—CROSS-EXAMINATION OF DEFENDANT IN CRIMINAL CASE.** In a prosecution for crime, where the court permitted questions to be asked of the defendant on cross-examination as to whether he had had a conversation with the mother of the prosecutrix, there was no error, since the right to lay a foundation for impeachment by testimony of the mother did not depend upon whether the questions propounded for that purpose were of themselves proper cross-examination. (Page 79.)
6. **CRIMINAL LAW—EVIDENCE—MAP OF LOCALITY OF CRIME—TAKING TO JURY ROOM.** In a prosecution for crime, where a map used at the trial to illustrate testimony with regard to the movements of the parties was not formally introduced in evidence, but was given to the jury by a bailiff, and consulted by them in the jury room, the use of such map by the jury merely to gain better understanding of the testimony was proper, and the irregularity of its having been used by them without being formally introduced in evidence did not affect the legality of the verdict or the fairness of the trial.<sup>1</sup> (Page 80.)
7. **CRIMINAL LAW—PROVINCE OF JURY—WEIGHT OF EVIDENCE.** Questions as to the weight of evidence and credibility of witnesses, as affected by slight discrepancies in testimony, are for the jury, and beyond the reach of the appellate court, where some substantial evidence supports every essential ingredient of the offense charged. (Page 81.)
8. **CRIMINAL LAW—TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTED CHARGE.** Where the jury is charged fully and accurately, no error can be predicated upon any refusal to give any requested instruction. (Page 81.)

Appeal from District Court; Fifth District; Hon. *J. Greenwood*, Judge.

The appellant was convicted of a felony. He appeals.

**AFFIRMED.**

*W. F. Knox* for appellant.

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<sup>1</sup>*State v. Riley*, 41 Utah, 225, 126 Pac. 294.

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State v. Benson, 46 Utah 74.

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A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen. for the State.

FRICK, J.

The appellant was convicted of a felony, namely, of an assault upon a female of the age of fifteen years with intent to have carnal knowledge, and appeals.

A large number of errors are assigned, but we shall consider those only which are argued in appellant's brief.

Comp. Laws 1907, Section 4221, provides:

"Any person who shall carnally and unlawfully know any female over the age of thirteen years and under the age of eighteen years shall be guilty of a felony."

Section 4495, in part, provides:

"Any act done with intent to commit a crime, intending but failing to effect its commission, is an attempt to commit a crime." 1

In the information it was charged that:

Appellant "then and there willfully, unlawfully, feloniously, and with force and violence did make an assault upon the person of one (naming the prosecutrix), *and did then and there lay hold of the person of said \* \* \* and threw her upon the ground with the intent her, the said, \* \* \** then and there willfully, unlawfully and feloniously to carnally know, she, the said, \* \* \* being then and there a female over the age of thirteen years, and under the age of eighteen years, to wit, of the age of fifteen years," etc. (Italics ours.)

It is contended that the words set out in italics were unnecessary to the charge, and were prejudicial to the appellant. It is asserted that in *State v. Evans*, 27 Utah, 12, 73 Pac. 1047, and in *State v. Williamson*, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780, it was held that an information in the language of the sections we have quoted above was sufficient without setting forth specific acts of the accused in making the attempt to have carnal knowledge. It is true that it was, in effect, so held in those cases. The holding was, however, in answer to the contention that the information was insufficient because the specific acts attributed to

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Appeal from Fifth District.

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the accused in attempting to have carnal knowledge were not set forth. Neither of those cases is authority for the claim that it constitutes error to set forth the acts of the accused in making the attempt to have carnal knowledge. Nor do we think that a holding to that effect would be either sound or reasonable. In this case the evidence introduced on behalf of the state supported the acts as charged in the information and as we have outlined them, and hence we cannot see how the appellant could have been legally prejudiced by what was charged in the information. It certainly was proper on the part of the state to prove just what it was claimed the appellant did in making the attempt to have carnal knowledge, and, if it was proper matter of proof, it could not have been prejudicial error to have alleged it.

It is next contended that the court erred in permitting the state to introduce in evidence the skirt which the prosecutrix testified she wore at the time of the alleged assault upon her by appellant, for the reason that it was made to appear that the skirt had been washed once and worn several times after the assault. The prosecutrix, in effect, testified **2, 3** that the appellant assaulted her and threw her upon the ground and attempted to raise up her clothes, and in doing so tore her skirt. She fully described the tear, and the skirt was produced before the jury for no other purpose than to show them the tear and the extent thereof. For that purpose it was proper to admit the skirt in evidence, and the fact that it had been worn and washed after the alleged assault would not be sufficient to authorize its exclusion from the jury. *Pate v. State*, 150 Ala. 10, 43 South. 343; Underhill on Criminal Evidence, Section 48. The weight to be given to the tear in the skirt as evidence of violence, if any, was for the jury. The authorities cited by counsel for appellant that articles and things generally which are to be used in evidence should be maintained in substantially the same condition they were in at the time of the occurrence of the acts which they are produced to evidence or to illustrate are good law, but they have no application here; since the tear in the skirt for evidentiary purposes was practically in the same condition, and the changes, if any, were fully described

to the jury before the skirt was admitted in evidence. The court committed no error, therefore, in admitting the evidence.

It is next contended that the court erred in permitting certain statements made by appellant on his cross-examination to be impeached. The state produced the mother of the prosecutrix as a witness. In her testimony in chief 4 she was not questioned, nor did she testify, respecting a certain conversation which she had with appellant on the morning succeeding the alleged assault upon her daughter, the prosecutrix. The appellant, however, testified in his own behalf, and upon cross-examination he was asked by the state's counsel whether or not he did not have a conversation with the mother of the prosecutrix on the morning succeeding the alleged assault in which he made certain statements. He admitted that he had a conversation with her, but denied that he had made the statements attributed to him in that conversation. The mother was then called in rebuttal to contradict the appellant. She testified that he had made the statements to which his attention was directed and which he denied making on his cross-examination as aforesaid. It is now insisted that the evidence was not proper rebuttal, and was also improper as impeachment. We think otherwise. The statements which appellant denied making could have been introduced in evidence against him as part of the mother's evidence in chief. This being so, the statements could also be introduced in rebuttal as tending to impeach the appellant, if proper foundation therefor was laid. The rule is tersely stated in 40 Cyc. 2723, in the following words:

"A party's declarations or admissions against interest, being admissible as independent evidence against him, may be shown without first calling them to his attention, although they also tend to discredit him by reason of inconsistency with his testimony, and the evidence, being properly before the jury, may be considered by them as affecting his credibility. But, where it is sought to bring statements of a party contradictory to his testimony into the case for the sole purpose of impeachment, a foundation must be laid the same as for the impeachment of any other witness."

This is the prevailing rule. In some of the New England

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states it is not even necessary to lay a foundation for impeachment by calling attention to the conflicting or variant statements, if any are shown. Counsel for appellant, in their brief, referring to this matter, say: "The state had the right to ask her (the mother) touching any admissions or statements made to her by the defendant (appellant), but the state failed to ask her about any statements made to her by defendant."

What counsel say is true, but the state laid the foundation for impeachment by asking appellant upon cross-examination whether or not he had made the statements attributed to him in the question propounded to him. To concede, therefore, that the mother could have testified to the statements inquired into on her testimony in chief is to concede their relevancy and materiality, and hence it was proper to direct the attention of appellant to those statements, and ask him concerning their truth on cross-examination, and, if he denied making the statements, the mother could be called on rebuttal, just as was done, to impeach him. In view that the appellant testified in his own behalf in this case, the state was given the choice of methods, whether to prove the statements as part of the evidence in chief or as was done. Of course, if appellant had not testified as a witness, then any statements attributed to him would have to be produced as evidence in chief, and not in rebuttal in the form of impeachment.

What has been said also disposes of the contention that the court erred in permitting the foundation questions to be propounded to appellant because they were not proper cross-examination. The right to lay the foundation for 5 impeachment does not depend upon whether the questions propounded for that purpose are, in and of themselves, proper cross-examination or not. If that were the case, the accused could always prevent impeachment by remaining silent with respect to the contradictory statements. If he testifies with respect to matters which it is claimed are contradictory of his former statements, he may be cross-examined upon them as a matter of course, and, if he remains silent with regard thereto in his testimony in chief, he may, nevertheless, be questioned concerning them in a proper way for the purpose of laying the foundation for impeachment upon

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his cross-examination. The District Court committed no error, therefore, in permitting the questions to be propounded to the appellant nor in receiving the statements of the mother in contradicting appellant.

It is further contended that prejudice resulted to appellant because the jury were permitted to have before them a certain map or plat which was used at the trial of the case to illustrate the testimony of the witnesses in regard to the movements of the prosecutrix and the appellant on the night of the alleged assault and where it occurred. It is contended that the map in question was not formally introduced in evidence, and hence it was error to permit the jury to take the same to the jury room and to inspect the same during their deliberations. It seems the map was given to the jury by the bailiff who had them in charge, which fact was made to appear for the first time on appellant's application for a new trial. It was also made to appear from the record that both the appellant and his counsel knew at the time that the map was given to the jury, but neither of them made any objection or protest until after the verdict was returned. Assuming, without deciding, that they were not required to make any objection at the time, and that the objection in the motion for a new trial was timely, yet we cannot see how the appellant was prejudiced by permitting the jury to have before them the very map which was constantly referred to by the witnesses called by both parties to illustrate their testimony. The map, as a matter of course, did not constitute original nor independent evidence, and the jury must have so understood and regarded it. At most, it could only aid the jury by giving them a better understanding of the testimony of all of the witnesses who were familiar with the landmarks referred to on the map. For that purpose, it was proper, and the mere fact that it was taken to the jury room in the manner detailed could not change the purpose for which it was properly used. A question somewhat akin to the one now under consideration arose in *State v. Riley*, 41 Utah 225, 126 Pac. 294. In that case certain articles which were used in evidence were permitted to be taken by the jury to their room during their deliberations. It was

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Appeal from Fifth District.

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there held that, while it was improper to permit the articles to be taken by the jury as was done during their deliberations, yet, in view that the articles were used and referred to during the trial, it, at most, constituted an irregularity which did not affect the legality of the verdict nor the fairness or impartiality of the trial. The objection here made to the use of the map in question by the jury as aforesaid, for patent reasons, is of much less force than was the objection to the use of the articles by the jury in the Riley case. While we do not wish to be understood as either directly or indirectly approving the practice of giving to the jury any article, map, or other thing used at the trial which is not formally introduced in evidence, and which does not come within our statute as a thing that may be taken to the jury room, yet in this case, as in the Riley case, what is objected to constituted merely an irregularity which does not affect the legality of the verdict.

It is next urged that the District Court erred in not granting appellant a new trial, for the reason that the evidence is insufficient to sustain the verdict. The evidence, all of which is preserved in the bill of exceptions, is sufficient to sustain the verdict of the jury. True, counsel for appellant points out slight discrepancies therein, and further adverts to some reasons why the state's evidence, in some particulars at least, should not be given credence. All those 7 questions, however, were for the jury to consider. We have no power to pass upon the weight of the evidence nor upon the credibility of the witnesses. All we may do is to scrutinize the evidence for the purpose of determining whether there is some substantial evidence in support of every essential ingredient constituting the charged offense. In this case there is sufficient evidence to sustain the charge, and hence we cannot interfere.

There are two other assignments urged in the brief. One of them relates to the instructions to the jury given by the court and to the failure to charge as requested. There is nothing in the contention that requires special con- 8 sideration. The law given in the court's charge was



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sufficiently full and specific to guard all the rights of the appellant and no error was committed, therefore, in the charge as given or in refusing to charge as requested. The only other assignment urged in the brief is too trivial to require discussion.

The judgment is affirmed.

STRAUP, C. J., and McCARTY, J., concur.

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ADAMS v. MANNING.

No. 2708. Decided April 21, 1915 (148 Pac. 465).

1. **FRAUDS, STATUTE OF—CONTRACTS.** A memorandum, reciting the receipt of thirty dollars as part payment for thirty acres of land, is insufficient to take the case without the statute of frauds, not describing the land. (Page 84.)
2. **SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY.** Evidence held insufficient to establish the terms of a parol contract for the sale of land, with the clearness and exactness necessary to award specific performance.<sup>1</sup> (Page 84.)
3. **FRAUDS, STATUTE OF—PART PERFORMANCE.** Where one who owned considerable land contracted to sell thirty acres, the fact that the purchaser mended fences on a particular thirty acres, and occasionally grazed stock thereon after paying part of the purchase price, is not such a part performance as will take the case out of the statute of frauds; the contract not designating the particular land. (Page 84.)
4. **FRAUDS, STATUTE OF—POSSESSION.** Where a contract for the sale of thirty acres of land did not designate the property, and the grantor owned considerable land, mere possession of a particular parcel by letting stock graze thereon will not take the case out of the statute of frauds by identifying the land. (Page 87.)

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<sup>1</sup>Citing *Montgomery v. Barrett*, 40 Utah 385, 121 Pac. 569; *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767.

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Appeal from Second District.

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Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by M. Louisa Adams against Harry Manning.

Judgment for defendant. Plaintiff appeals.

REVERSED AND REMANDED.

*Goodwin & Van Pelt* for appellant.

*Halverson & Pratt* for respondent.

FRICK, J.

The plaintiff, appellant here, commenced this action as the duly appointed and acting executrix of the last will and testament of one D. C. Adams, deceased, to enjoin the defendant from continuing to trespass on certain real property of which, it is alleged, the said D. C. Adams, on May 14, 1908, the day of his death, was the owner in fee and in possession and entitled to possession. The land in question is specifically described. The respondent filed an answer to the complaint in which he admitted that said Adams died on the date aforesaid, and that "on and prior to the 14th day of May, 1908," said Adams was the legal owner of the land described; admitted that appellant was the duly appointed and acting executrix of the estate of said Adams; and denied all other allegations. Respondent also pleaded a counterclaim in which he, in substance, alleged that on October 19, 1907, he purchased the land described in the complaint for the sum of \$100, of which amount, he alleged, he had paid said Adams the sum of thirty dollars; that at the time of said sale said Adams executed and delivered to the respondent the following agreement in writing, to wit:

"October 19, 1907. Received of H. W. Manning thirty dollars (\$30) as part payment of thirty acres of land. Price to be \$100 for said land. D. C. Adams."

It was further alleged that possession of said land was delivered to the respondent, and that he thereafter built fences and made "valuable improvements" thereon; that on the 29th day of November, 1911, respondent tendered to

appellant the amount "due under said agreement"; that she had refused to receive or accept the same; and that he produces the money in court. Appellant filed a reply to the counterclaim in which she set up the statute of frauds and denied the other allegations. A trial to the court resulted in findings of fact and conclusions of law in favor of the respondent upon which the court entered a decree requiring appellant to specifically perform the alleged contract by executing a deed to said land, etc.

Various errors are assigned, among which are that the court erred in its findings of fact and conclusions of law and in entering a decree as aforesaid. The principal error relied on is that the evidence is insufficient to justify the findings and to authorize a decree of specific performance. 1 In connection with that contention, appellant's counsel insist that the receipt or memorandum pleaded and relied on by respondent is insufficient as a memorandum under the statute of frauds. We think this contention must prevail.

Under all the authorities, the memorandum here in question is wholly insufficient to take the alleged sale out of the statute of frauds for the reason that there is no sufficient or any description of the land alleged to have been sold. See 36 Cyc. 591-593, inclusive; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Browne on Statute of Frauds* (5th Ed.), section 385. We have a case therefore of an alleged parol contract for the sale of real property. Respondent, however, insists that, although the contract rests in parol, it is nevertheless enforceable upon the ground of part performance. The part performance relied on is the payment of the thirty dollars coupled with the alleged possession. As we have seen, however, respondent must rely upon a parol contract of sale.

The first essential, therefore, is to establish that contract. Since the receipt referred to is utterly insufficient to establish a contract, it must be established by other competent evidence. Has respondent produced evidence by which a parol contract of sale is established with that clearness and precision which is required in courts of equity where specific performance of parol contracts respecting the sale of 2, 3 real estate is sought? All the authorities are to the

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effect that such contracts must be clearly established, and we are firmly committed to that doctrine. *Montgomery v. Berrett*, 40 Utah, 385, 121 Pac. 569; *Price v. Lloyd*, 31 Utah, 86, 86 Pac. 767, 8 L. R. A. (N. S.) 870. See, also, 36 Cyc. 543. In the case at bar one of the parties to the alleged contract, namely, D. C. Adams, is dead. Under our statute, therefore, the other party to it is disqualified to testify to any conversation or transaction between him and the deceased, or to any fact relating thereto, which was equally within the knowledge of both. From the evidence it appears that there was no other person present except respondent and the deceased when the alleged contract of sale was entered into. Respondent being disqualified to testify, there is therefore no direct evidence of what the terms and conditions of the contract were. Respondent, however, attempted to bridge over this chasm by putting his son on the stand, who testified, in substance, that he was acquainted with the deceased; that he knew his handwriting; that the signature to the receipt in question was in the handwriting of the deceased; that the respondent went into possession of the land in question about the time the receipt bears date, and since then has remained in possession. The respondent, in substance, testified that he went into possession about that time, and that he has been in possession ever since, and that he had built some fences upon the land and repaired some; that the land was only fit for pasturing stock; and that he had used it for that purpose only. There is also undisputed evidence that D. C. Adams was the owner of a considerable quantity of the same kind or character of land, lying in the vicinity of and adjoining the thirty acres in question; that it was uncultivated pasture land and could be used only for a few months in the year to pasture live stock; and that it had been used for that purpose for a long time prior to 1907, when the alleged contract was entered into. Indeed, the respondent admitted that the only possession he had or took of the land was to permit his stock, or some of it, to pasture on it during a certain period of each year. One or two other witnesses claimed that they were in possession of the land in question some time after the year 1907 for a certain part of the year; but the court found the fact against

them, and we shall therefore not dwell upon that phase of the case except as it may be material in determining the character of respondent's possession. It was also attempted to be shown that the deceased had no other thirty acres of land in that vicinity. This attempt, however, signally failed, even though it had been proper to show such fact under the memorandum or receipt in question. This is not a case where a person sells his house and lot on a certain street, or sells a certain farm or property by its usual name, or otherwise names the property without specifically describing it so that it may by parol evidence be identified as the property mentioned in the memorandum. To refer to the subject-matter of the alleged contract as "thirty acres of land" is not aided by parol evidence since there is absolutely nothing which points to one thirty acres of land any more than to any other thirty acres. No one will seriously contend, we think, that merely to describe the land in the memorandum thus, "I hereby sell a lot 50x100 feet," could be aided by parol evidence. To say "thirty acres of land" is just as indefinite, and therefore cannot be aided.

Respondent therefore has not legally established the terms of any contract. True, one may conjecture what passed between the deceased and the respondent respecting the land, but one cannot say that a particular contract for any particular land was proven. In such cases the contract cannot be assumed and enforced as assumed. As has been well said:

"To call anything a part performance, before the existence of the thing (the contract) whereof it is said to be part performance is established, is an anticipation of proof by assumption, and gets rid of the statute by jumping over it, for the statute requires proof, and prescribes the medium of proof." Roberts on Frauds, 135.

It has been thought by some writers that the foregoing quotation states the law too strongly against the enforcement of parol contracts where such enforcement is based upon the ground of part performance. Perhaps under the peculiar circumstances of some cases in the practical application of the law the statement may be somewhat strong. It has, however, always seemed to the writer that, unless the courts are very careful in the admission of parol evidence and in acting

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upon the mere inherent probabilities as such appear to the courts, they will, in equity, enforce parol contracts which are clearly within the statute as readily as courts of law enforce all other contracts and will thus entirely fritter away the statute of frauds. As we view it, no hard and fast rule should prevail in such cases, and the statute should be given due effect, and, if a case is presented the inherent equities of which require specific enforcement, it should be enforced without hesitation, and if, upon the other hand, such is not the case, specific enforcement should be denied. If it can be said that a contract of sale is established in this case, we may meet tomorrow with a case where the alleged purchaser issued and delivered to the alleged vendor a check on which the former wrote the words "part payment of ten acres of land," and, in view that the alleged vendor has indorsed the check and received the money and then has died, the alleged purchaser produces the check and indorsement, and in connection therewith claims he took possession, constructive or otherwise, of the land alleged to have been sold, and asks and is given specific performance if he will pay the remainder of the purchase price whatever it may be. What becomes of the statute of frauds under such circumstances? In this case therefore a contract, in our judgment, has not been sufficiently established, and without a specific contract there is nothing to enforce.

Counsel for respondent, however, seem to think that their client can prevail upon the ground that he went into possession of the thirty acres of land. Proof of possession alone cannot establish the contract which it is sought 4 to have specifically performed. Proof of possession may be very strong evidence of part performance of a particular contract. In order, however, to make possession available as part performance, it must appear that it was given or taken in pursuance of the parol contract proved; that such possession was notorious, that it was exclusive and of the very tract of land which was the subject of the contract, and some courts have held that the possession must be actual and of the whole tract. See Browne on the Statute of Frauds,

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Sections 473-477, inclusive. In speaking of the character of possession in such cases, it is said:

"To allow a mere technical possession not open to the observation of the neighborhood, and capable of being proved only by select and confidential witnesses, to be sufficient for obtaining a decree to enforce the contract, would manifestly afford an opportunity for the encouragement to dishonest testimony."

Moreover, in view that possession is a prerequisite upon which is based the right to prove a contract by parol evidence, the possession should be established without qualification or doubt. In this case the proof of the character of the possession is not as clear and satisfactory as it should be. To say the least, it does not seem to have been generally known in the neighborhood, since the property always was assessed to the estate and it paid the taxes during all of the years after 1907 until the time of trial in 1912. Then, again, respondent's claims are entirely devoid of equity. While he claims that he built and repaired fences, he nevertheless utterly failed to produce any evidence whatever of their value. Notwithstanding this dearth of evidence, however, the court found that the respondent built fences and "made valuable improvements" on the land. We can only account for this finding upon the theory that the record discloses that the case was tried in September, 1912, but not decided until March, 1914, and the bill of exceptions was not settled until the following April. It may be, therefore, that the court had forgotten, or at least overlooked, the important points of the evidence. Indeed, it is only upon the foregoing theory that we can understand how the court could have found that a contract was established with that degree of certainty required in equity for specific performance.

With a view of finding some case where a court has held that under facts and circumstances like those in the case at bar a decree of specific performance was proper, we have examined the following cases from the following jurisdictions: *Rovelsky v. Scheuer*, 114 Ala. 419, 21 South, 785; *Arkadelphia L. Co. v. Thornton*, 83 Ark. 403, 104 S. W. 169; *McCarger v. Rood*, 47 Cal. 138; *Marrimer v. Dennison*, 78 Cal. 207, 20 Pac.

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386; *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885; *Demps v. Hogan*, 57 Fla. 60, 48 South 998; *Morgan v. Battle*, 95 Ga. 663, 22 S. E. 689; *Wilkie v. Miller*, 171 Ill. 556, 49 N. E. 484; *Denlar, Adm'r. v. Hile*, 123 Ind. 68, 24 N. E. 170; *Caldwell v. Drummond* (Iowa) 96 N. W. 1122; *Green v. Jones*, 76 Me. 563; *Moale v. Buchanan*, 11 Gill & J. (Md.) 314; *Ayres v. Short*, 142 Mich. 510, 105 N. W. 1115; *Atkins v. Little*, 17 Minn. 342 (Gil. 320); *Simmons v. Headlee*, 94 Mo. 482, 7 S. W. 20; *Southmayd v. Southmayd*, 4 Mont. 100, 5 Pac. 318; *Morrison v. Gosnell*, 76 Neb. 539, 107 N. W. 753; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404; *Dunckel v. Dunckel*, 141 N. Y. 427, 36 N. E. 405; *Sprague v. Jessup*, 48 Or. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410; *Graft v. Loucks*, 138 Pa. 453, 21 Atl. 203; *Peay v. Seigler*, 48 S. C. 512, 26 S. E. 885, 59 Am. St. Rep. 731; *Holmes v. Caden*, 57 Vt. 111; *Bryson v. McShane*, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527; *Hege v. Thorsgaard*, 98 Wis. 11, 73 N. W. 567; and *Brown v. Sutton*, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664.

While more cases illustrating the doctrine of specific performance could have been cited, we have selected the foregoing for the reason that it is conceded that specific performance was granted in those cases upon what, in popular phraseology, may be termed liberal terms with regard to part performance. The only jurisdiction, however, in which it may be said specific performance was decreed upon what seem to be very liberal terms, is Oregon, in the case of *Sprague v. Jessup*, *supra*. Even in that case, however, the Supreme Court sustained the judgment of the lower court only because the parol contract was held to have been clearly established and for the reason that that court thought it discovered some equities in favor of the purchaser. The result in that case was, however, not unanimous. Moreover, in that case both parties to the contract were living and testified at the trial. Where such is the case, and the contract is clearly established, and the possession and the character thereof is without dispute, some courts have gone great lengths to find some ground upon which to base a decree for the enforcement of the contract. A careful examination of the foregoing cases will disclose, however, that



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in each case the court based its ruling upon some strong and tangible equity in favor of the vendee or lessee, as the case may be. In many of the cases the court found that the refusal to decree specific performance would result in permitting the defendant to perpetrate a fraud upon the plaintiff, and that such would have been the case is made clearly apparent from the facts reported. Nothing of that character exists in this case. According to respondent's own evidence, as it now stands, he received more from the use of the property than he has paid. Not a single equity, not even the inconvenience of removing from the land, is thus shown. How can respondent complain, therefore, when he has wholly failed to establish an enforceable contract with that clearness which would authorize a court of equity to enforce it, and where he had not shown a single equity in his favor to invoke the aid of a court of equity?

By what we have said we do not wish to be understood as passing upon the question of whether, in a case where the contract is clearly established and the possession and the character and purposes thereof are not in dispute, possession alone, or possession coupled with part payment without other equities, is or is not sufficient to authorize a court to decree specific performance of the contract. That question is not necessarily involved here, and hence we leave it undecided.

From what has been said, it follows that the judgment should be, and it accordingly is, reversed; and the cause is remanded to the district court of Davis County, with directions to make findings of fact and conclusions of law and to enter judgment in favor of the plaintiff as to title and possession of the property in question. With regard to damages the court is directed as follows: The parties stipulated the rental value of the land in question during defendant's occupation thereof to be sixty dollars. The defendant paid thirty dollar to D. C. Adams during his lifetime, and also built some fences and made some repairs, the value of which is not shown; but enough is made to appear from the evidence that neither were of great value or importance. In view of the whole evidence, we think that justice is best subserved by closing this litigation. The court will therefore enter judg-

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ment awarding plaintiff nominal damages, merely, together with the costs of the action. Defendant to pay the costs of this appeal.

McCARTY, J., concurs.

STRAUP, C. J.

I concur. I think the memorandum, for several reasons, is wholly insufficient to satisfy the statute of frauds. The evidence, *aliunde* the memorandum, considered alone or with the memorandum, fails to show a contract complete or certain in its terms. The respondent thus invokes equity to enforce, not a contract sufficiently evidenced by a writing to satisfy the statute of frauds, but one resting partly in writing and partly in parol and which is not even shown to be either complete or certain. When one thus seeks to specifically enforce a contract concerning realty, void because of the statute of frauds, he is required to show by clear and convincing proof, not only elements of completeness and certainty, but equities as well, and as stated in Pomeroy's Specific Performance of Contract, p. 144, and Pomeroy's Equity Jurisprudence (3d Ed.) Section 1409, approved in *Price v. Lloyd*, 31 Utah, 86 86 Pac. 767, 8 L. R. A. (N. S.) 870. Since there is shown neither a contract certain or complete in its terms, nor equities to justify specific performance, I therefore concur.

## REQUA v. DALY-JUDGE MINING CO.

No. 2705. Decided April 21, 1915 (148 Pac. 448).

1. **APPEAL AND ERROR—DECISION—EFFECT ON SECOND APPEAL.** A decision by the Supreme Court that a certain defendant is not liable in a personal injury action is controlling on that question on a subsequent appeal. (Page 94.)
2. **WITNESSES—IMPEACHMENT—INCONSISTENT STATEMENTS — OMISSIONS.** Evidence in a personal injury action that a witness, while testifying before a coroner's jury as to the accident, had omitted to testify as to matters to which he testified in a deposition subsequently taken, was not improperly admitted as being in impeachment without a proper foundation made, where he had first been interrogated and given opportunity to explain the omission. (Page 94.)
3. **WITNESSES—IMPEACHMENT—INCONSISTENT STATEMENTS—FOUNDATION.** To impeach a witness on the ground of former inconsistent statements or omissions, foundation must first be laid by asking him if he made such statements, or directing his attention thereto, with the time, place and circumstances, so that he may have full opportunity to admit, deny or explain them. (Page 97.)
4. **EVIDENCE—OPINION—CONCLUSIONS OR FACTS.** An answer in a personal injury action that it was the "duty" of certain employees to examine as to the safety of the place of work, in response to a question as to what was the "custom" in that respect, was not erroneously admitted as stating a conclusion. (Page 99.)
5. **APPEAL AND ERROR—REVIEW—HARMLESS ERROR—CONDUCT OF COUNSEL.** In a personal injury action against independent contractors, a question asked one of defendants as to whether work had been suspended because the firm was insolvent, which was immediately withdrawn, was not prejudicial error. (Page 100.)
6. **TRIAL—ARGUMENT OF COUNSEL—MATTERS NOT SUSTAINED BY EVIDENCE.** In an action for injuries due to the falling of a rock in a tunnel, a statement by defendant's counsel in argument that the rock was caused to fall by the removal of its supports by deceased was not improper as not being supported by evidence, where such statement was, at most, a faulty deduction from evidence in the record. (Page 101.)

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7. **TRIAL—CONDUCT OF COUNSEL—REMARKS TO OPPOSING COUNSEL.** Statements by defendant's counsel in a personal injury case during the noon recess, directed to plaintiff's counsel in the hearing of the jury, as follows: "State your name, age and place of residence." "He is a good witness. He is mum." "There was a time when lawyers would row and quarrel with each other and indulge in personal remarks, but that time is over"—to which no reply was made, did not constitute improper conduct of counsel. (Page 102.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by Rose Requa, individually and as guardian ad litem, etc., against the Daly-Judge Mining Company and others.

Judgment for defendants. Plaintiff appeals.

**AFFIRMED.**

*Henry Shields* and *M. E. Wilson* and *E. A. Walton* for appellant.

*King & Nibley*, *P. T. Farnsworth, Jr.*, and *Howat, Macmillan & Nebeker* for respondents.

**FRICK, J.**

The plaintiff, in her own right, and as guardian *ad litem* for her minor children, brought this action to recover damages for the alleged wrongful death of her husband. The action was originally commenced against the Daly-Judge Mining Company, *E. A. Taylor*, and *J. S. Free*, as partners, and against the Snake Creek Mining & Tunnel Company. Before the trial plaintiff dismissed as to the defendant Daly-Judge Mining Company, and therefore that company is out of the case. After the evidence was all in, the court directed the jury to return a verdict in favor of the Snake Creek Mining & Tunnel Company upon the ground that said Free & Taylor were independent contractors. The case was then submitted to

the jury as against said Free & Taylor, and the jury returned a verdict, in their favor. Judgment was duly entered, from which plaintiff appeals.

The appeal also includes the judgment in favor of the Snake Creek Mining & Tunnel Company. The case, upon that question was submitted to us upon the briefs filed and authorities cited in the case of *Dayton v. Free et al.*, which was submitted to this court at the May, 1914, term, and decided December 1st following. *Dayton v. Free et al.*, 1 46 Utah, . . , 148 Pac. 408. We held in that case that said Free & Taylor, in constructing the tunnel in which the deceased was killed, were independent contractors, and that, therefore, said Snake Creek Mining & Tunnel Company was not liable for the accident. That decision controls this case upon that question, and therefore the appeal against said company must fail in this case for the same reasons that it failed in the Dayton Case, *supra*.

This brings us to the assignments of error against the judgment in favor of Free & Taylor. We shall state so much of the evidence as we deem necessary in connection with the points decided.

The first assignment relates to the admission of evidence which counsel insist was improperly admitted as being in impeachment of one of plaintiff's witnesses without having properly laid a foundation for the admission of such evidence. The alleged impeaching evidence was admitted to show that one Patrick Tierney, a witness for plaintiff, a few days after the accident, while testifying as a witness before a coroner's jury which was inquiring into the cause of the accident, had omitted to testify to some matters which he testified to in his deposition which was taken to be used, and which was used, at the trial of this case. The witness, on cross-examination by counsel for Free & Taylor, was asked and answered the following, among other, questions (we quote from the original bill of exceptions): After asking the witness whether or not he had testified as a witness before the coroner's jury, and receiving his answer in the affirmative, he was asked: 2

"Q. Did you tell the court at the time of that coroner's

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inquest, when those jurors were there sitting and hearing that case—did you tell them that Abplanalp (the foreman for Free & Taylor) told Requa (the deceased) that it was safe, and ordered him to put up his bar, put up his machine? A. Yes, sir; if they asked that question, I did. Q. Well, did you tell them that then? A. It seems like I did. I am not sure though. Q. It seems like you did? A. Yes, sir. Q. You knew what you were there for? A. Yes, sir. Q. To tell what you knew about this matter? A. To tell whatever they asked me, just the same as now. Q. Did you tell them? A. I told them the truth, whatever they asked me. \* \* \* Q. Can't you answer? Haven't you any recollection as to whether you told them at that time, a day or two or three days after this thing occurred, whether Abplanalp told Requa that it was safe, and to go ahead and put up his bar, that is, his machine? A. I did; I told you I did tell them that. Q. You have a recollection of doing so? A. Yes."

There are more of the same kind or character of questions and answers, but the foregoing sufficiently illustrates the state of the evidence upon the subject. It seems that it was contended by counsel for Free & Taylor that the witness at the coroner's inquest had not testified to the fact that Abplanalp, the foreman for Free & Taylor, had induced or ordered the men working at or near the face of the tunnel, including the deceased, to proceed to work, and that the place was safe for them to do so. It was made to appear that Requa was killed a short time after the alleged order or statement was made by the foreman by a rock which fell partly from the roof and partly from the upper side of the tunnel, and a few feet from its face, which rock the men working there, including the deceased, had tried to pry down a little while before it fell, which they did not succeed in doing. It was a matter of some importance, therefore, for plaintiff to show that the foreman had pronounced the place safe and had directed the deceased to go to work at or near the rock which fell and killed him. The witness, in his deposition, testified that the foreman had stated that the place was safe, that it was all right, and told the men, including the deceased, to continue their work. What has been said sufficiently ex-

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plains the purpose of Free & Taylor's counsel in asking the witness the questions we have set forth. Counsel for Free & Taylor called Mr. Taylor as a witness, and, after showing by him that he had attended the coroner's inquest, and had heard Mr. Tierney testify, the witness was asked and answered (again quoting from the bill of exceptions) the following questions:

"Q. I will ask you whether, at that time and place, Mr. Tierney said that Frank Abplanalp had ordered that he put up the bar and go to work, and that it was all right, or anything in substance like that. Mr. Wilson (counsel for plaintiff): I object to that on the ground it is incompetent, immaterial, and irrelevant; no proper foundation having been laid, and not being proper subject-matter of impeachment, whether he said it there or did not say it. The Court: The objection is overruled. Mr. Wilson: Exception. A. He did not. \* \* \* Q. Did he say, during that testimony, that Abplanalp said it was all right, or anything in substance like that? Mr. Wilson: Same objection. The Court: The objection is overruled. Mr. Wilson: Exception. A. To the very best of my recollection, he did not."

This is practically all the court admitted upon that subject. It is now urged that the impeachment in question is what, by the text-writers, is termed impeachment by significant omissions, and that such impeachment is proper only where it is shown that the witness was especially interrogated respecting the particular matter upon which he is sought to be impeached, and that he then omitted to state the matter. In that connection it is contended that the proper foundation was not laid to admit the impeaching evidence, for the reason that it was not shown that the witness was interrogated at the coroner's inquest respecting the things alleged to have been omitted. It seems to us, however, counsel assumes a fact which, to say the least, is open to serious controversy. While it is true that, on the one hand, it could be argued from the face of the record that it does not appear that the witness was asked specific questions at the coroner's inquest, yet it is equally true that, upon the other hand, from the same record it can fairly be argued that he was, and that the ad-

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missions he made are to that effect. At most, therefore, the fact of whether the witness was or was not specially interrogated upon the subject is a matter of inference or deduction from what he testified to in his deposition. The witness, however, insists that he did testify to the same facts at the coroner's inquest that he did in his deposition. Wherein is it material, therefore, whether he was asked the specific questions at the inquest or not?

It certainly will not be disputed what has become elementary practice; namely, that a witness may be impeached by showing that he has made contradictory 3 or variant statements, either under oath or otherwise, provided that (in most jurisdictions) the witness' attention has first been directed to the alleged contradictory or variant statements and the time, place, and circumstances under which they were made. In 5 Jones, Com. Evidence, Section 845, in speaking upon this subject, the author says:

"But there is hardly any more familiar practice in judicial procedure than that of impeaching witnesses by proof of their former statements which are inconsistent with their present testimony. Since such attempted impeachment is a direct attack upon the testimony of the witness, and may result in serious consequences, it is important that the practise should be so regular that the witness may have full opportunity to admit or deny or explain any statement which is thus assailed. The authorities, except those in some of the New England states, are almost unanimous to the effect that, before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him, a foundation must be laid by interrogating him as to whether he had made such statements. The interrogation may extend to an inquiry as to important omissions from such original statement when it was his duty to tell the whole truth. Such an omission may create a presumption that the omitted facts did not transpire and may tend to contradict the testimony of the witness. This occurs especially where the witness was questioned concerning the particular matter and failed to disclose his knowledge. Otherwise the omission is insignificant or so capable of explanation as to negative any basis for impeachment."

The author then proceeds to show what constitutes a sufficient foundation. Ordinarily that is sufficiently laid when



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the witness' attention is sharply directed to the alleged statements or omissions with time, place, and circumstances added so as to give him full opportunity to explain the statements or omissions attributed to him. If the witness does not admit that he made the statements attributed to him, witnesses may then be called by the adverse party to show that he did so state. Further, if he does not concede that he made the important omissions in his former testimony or statements, witnesses who heard all of his testimony or statements upon the subject may again be produced to prove the omissions. In 7 Ency. Ev. 156, it is said:

"It is also proper to cross-examine a witness as to his significant omissions. \* \* \* Where, on cross-examination, the assailed witness does not distinctly admit that he made the omission, it may be proved to impeach him. When he admits having made it, it is also proper in some jurisdictions to prove it, but in others such proof should be excluded."

It is, no doubt, true that when a witness is especially interrogated with regard to a particular occurrence or transaction, and he omits to state certain material matters, which he, on a subsequent hearing, supplies, and the fact that he was especially interrogated is shown, then the effect that shall be given to his testimony or upon his veracity may be very different than if the witness had merely made a general statement without having been especially questioned with respect to the matter in question. These, however, are ordinarily mere matters of detail, and go to the weight that should be given to the fact that omissions occurred, and not to the competency of the evidence by which they are shown. The question is one of weight, therefore, rather than, as counsel argues, one of competency. The material thing upon such an inquiry is that the assailed witness be given a fair and full opportunity to explain his variant statements or omissions. It has frequently been held that, although a witness is impeached by showing variant statements without first laying a proper foundation, yet, if he is given ample opportunity to explain the discrepancies in his testimony or statements, then the error in not laying a precedent foundation is, ordinarily, not prejudicial. This, in the nature of things, is

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clearly right; since the so-called foundation is nothing more than to afford the witness an opportunity to explain any real or apparent discrepancies. A mere cursory examination of even the small part of the record we have set forth discloses that the witness Tierney was given every opportunity to explain the alleged omissions, and hence the authorities cited by counsel have no application here. Indeed, none of the authorities cited in any way conflict with the rule laid down by Mr. Jones as we have stated it. In view of what we conceive to be the settled law and practice, we are clearly of the opinion that the district court committed no error in admitting the evidence complained of.

It is next contended that the court erred in refusing to sustain the objection to a question propounded to Mr. Taylor, one of the defendants, and also one of the con- 4  
tractors. We again quote from the record:

"Q. State what the custom was of machine men when they went on shift making or not making examination. A. It was their duty to make a thorough examination to protect themselves. Mr. Wilson: I object to that as being incompetent, calling for a conclusion of the witness. The Court: The objection is overruled. Mr. Wilson: Exception."

Referring to this matter, counsel in their brief say:

"It may be that the question was proper, but it will be noticed that the objection of the appellants was made to the answer on the ground that it was incompetent and a conclusion. It is submitted that the matter requires no argument."

Now, if counsel are given the full benefit of the objection, yet it should not prevail. As appears from the brief, it is not disputed that the question was proper. If that be so, then, it seems to us, the answer was also proper. If the witness had substituted the word "custom" for the word "duty," the answer would strictly have followed the question. But it is manifest that the word "duty" used by the witness was used in the sense of "custom"; that is, instead of saying it was the machine men's custom to make an examination, he said it was their duty to do so. In view of the record, the effect of using the word "duty" was practically the same as

though the word "custom" had been used, although the former term is the stronger one of the two. Besides, the answer, strictly speaking, is not a mere conclusion. It is, at most, one of those answers which partake of both a conclusion and a statement of fact. At all events, under the circumstances, no prejudice could have resulted to the plaintiff, and hence the assignment cannot prevail.

Another assignment relates to the alleged misconduct of one of the defendants' counsel. From the bill of exceptions it is made to appear that for some reason the contractors, Free & Taylor, for a time at least, ceased to carry on the work of constructing the tunnel in which the acci- 5  
dent occurred. One of defendants' counsel, on cross-examination, propounded the following question: "Q. As I understood you to answer Mr. MacMillan, some trouble arose, and Free & Taylor were forced out from having anything to do with the work? A. Yes. Q. Forced out—broke?" Counsel for plaintiff then said: "I object to that." The defendants' counsel then immediately said: "I will withdraw it." Whereupon plaintiff's counsel continued his objection, and said: "I object to that and except to the statement as misconduct, the intimation that they were broke, as very improper." The Court: "The objection is sustained." Thus ended the whole matter. It is now vigorously contended that the statement by counsel that defendants were "forced out—broke," that is, that they were practically forced out insolvent, constitutes prejudicial error, for the reason that it may have influenced the jury in arriving at the verdict in favor of the defendants. If Free & Taylor were broke or insolvent, it is argued, the jury may have arrived at a verdict in their favor, because one against them would have been useless. Such a conclusion seems to us strained. While it is true that counsel's question was improper, and he conceded that it was by withdrawing it, yet it was one of those improprieties which frequently occur during the progress of a heated trial. If verdicts shall be set aside, and judgments reversed for such things, but few verdicts can stand. Moreover, such a trifle, for such it was, would not be likely to influence any juror in arriving at a verdict. If it should be said that it did,

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then it must necessarily follow that a juror so influenced would be wholly unfit to sit on any case, and we cannot assume that such was the fact. Besides, as the record stands, there is nothing but an improper question which remains wholly unanswered. While, no doubt, prejudicial error can be committed by merely asking improper questions, especially if they are repeated, yet where, as here, only one question is asked, which, as soon as counsel's attention is directed to it, is immediately withdrawn, there, ordinarily at least, is not the slightest probability that prejudice resulted. To hold otherwise would result in laying down a rule which would be productive of much more mischief than good.

It is further contended that one of defendants' counsel was guilty of misconduct in his argument to the jury. As already stated, the death of the deceased was caused by a large rock falling from the roof and side of the tunnel in which he was working. The rock fell some 6 time after certain blasts had been discharged in the face of the tunnel. In blasting large loose rock and debris, usually called "muck," was forced from the face of the tunnel, and was left at and near the face extending back on the sides of the tunnel for some distance. Some of this muck had to be removed in order to permit the machines to be again set for the purpose of drilling fresh holes in the face of the tunnel preparatory for another blast. It seems that the deceased at the time of the accident was engaged in removing some of the muck from the face and sides of the tunnel to make room for the setting of the machines. The muck, the testimony showed, extended upon the sides of the tunnel for about four feet or so. Some of it extended up to the point where the rock in question was before it fell. The offending counsel, in his argument to the jury, insisted that the deceased contributed to the accident by removing the muck from under the rock which fell upon him, and he thus, in removing the muck, had also removed that which supported the rock or kept it from falling. Plaintiff's counsel contended that counsel thus offended against the rules of proper conduct by making statements not supported by the evidence or upon a matter on which no evidence was produced. It is true that no

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witness stated in direct terms that the muck supported the rock, or that it had a tendency to do so. The lack of such evidence could, however, not prevent counsel from drawing his own inferences and making his own deductions from other evidence. The evidence was to the effect that the muck was piled up against the sides of the tunnel as high or higher than the lower side of the rock which fell. That the muck supported the rock in question may have been a weak, yes, even a fallacious, deduction to make, but it was not, as plaintiff's counsel contend it was, a statement of fact contrary to or not produced in evidence. At most, it was a faulty, and perhaps a very far-fetched, deduction or inference, but such deductions or inferences are often made, and they cannot be controlled by the courts. Most of us at times cease to be strictly logical, and we fear that a rule which penalized clients because the arguments and deductions of their attorneys were not always in strict harmony with the rules of logic would result in destroying the utility of courts, and lead to consequences concerning which we do not care to speculate.

Finally, it is contended that the same counsel was guilty of misconduct as follows: During the noon recess, and while the jurors were in the jury box, and while one 7 of plaintiff's counsel was sitting in the court-room near the jury box, the offending counsel also came into the court-room and addressed plaintiff's counsel thus: "State your name, age, and place of residence." Plaintiff's counsel remained silent, and counsel then said: "He is a good witness. He is mum." Again plaintiff's counsel made no reply. It is alleged that the offending counsel, still addressing counsel for plaintiff, said: "There was a time when lawyers would row and quarrel with each other and indulge in personal remarks, but that time is over." We confess our entire inability to grasp the offense which is supposed to lurk in counsel's question and statements. Is it possible that jurors can be influenced by what, *prima facie* at least, seemed to be mere pleasantries? We are not prepared to concede that such is, or ever can be, the case. We attribute counsel's insistence that the foregoing matters constituted prejudicial error to their zeal for the interests of their client. Great allowance must

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be made for counsel's zeal, and such is especially true in cases where, as here, the widow and orphaned children are seeking compensation for the loss of the husband and father, the bread winner of the family. Under such circumstances what may to others seem trivial will, through zeal of counsel, be greatly magnified. Undue zeal, therefore, under some circumstances, may be pardoned. The law, however, makes allowance for all those things, and the courts necessarily must do so.

We have thus considered and discussed every assignment, and, after a careful examination of the record, we are forced to the conclusion that no prejudicial error is shown, and that the judgment should be affirmed. Such is the order; defendants to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

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BROSTROM et al. v. LYNCH-CANNON ENGINEERING  
Co. et al.

No. 2697. Decided April 21, 1915 (148 Pac. 423).

1. **APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.** A verdict on conflicting evidence, and supported by some evidence, though weak, will not be disturbed on appeal. (Page 109.)
2. **MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE—INFERENCES.** Where an inference of the negligence of the employer, causing the death of an employee, arises from certain facts and circumstances, the inference may be strengthened by reason of the failure of the employer to offer any explanation of the cause of the accident.<sup>1</sup> (Page 110.)
3. **MASTER AND SERVANT—MISLEADING INSTRUCTIONS.** Where, in an action for the death of an employee, the court charged that there could be no recovery unless the jury found that decedent was working within the scope of his employment at the time of the accident, a charge that it was the duty of the employer to use reasonable care to keep the premises about which decedent

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<sup>1</sup>*Christensen v. Railroad Co.*, 35 Utah 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159; *Richards v. O. S. L. R. Co.*, 41 Utah 99, 123 Pac. 933.

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was employed in a reasonably safe condition was not objectionable as leading the jury to believe that the employer was liable, though the relation of master and servant, as to the particular work which decedent was doing at the time of the accident, did not exist. (Page 111.)

4. MASTER AND SERVANT—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE. An employee going on a scaffold prepared and intended for that purpose, and on which at least two employees were working at the time, is not guilty of contributory negligence, precluding a recovery for his death by the collapse of the scaffold. (Page 111.)
5. DEATH—ACTION FOR—DAMAGES—EXCESSIVE DAMAGES. Under Comp. Laws 1907, Section 2912, authorizing the jury, in an action for death, to award such damages as may be just, a verdict for \$5,300 for the negligent death of a man sixty-one years old, leaving a widow and three adult children and four minor children, aged eighteen, fifteen, fourteen and eleven years, respectively, was not excessive, where decedent was sober and industrious and of excellent health, and earning at the time of his death \$3.75 per day, and constantly employed for nine months in each year at a wage of between three dollars and four dollars per day.<sup>1</sup> (Page 112.)

Appeal from the District Court; Second District; *Hon. N. J. Harris*, Judge.

Action by Anna Brostrom and others against the Lynch-Cannon Engineering Company and another.

Judgment for plaintiffs. Defendants appeal.

AFFIRMED.

*Boyd, DeVine & Eccles* for appellants.

*E. A. Walton* for respondents.

FRICK, J.

The plaintiff Anna Brostrom, as widow of Niels Brostrom, deceased, and four other plaintiffs, to wit, Lavina Brostrom,

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<sup>1</sup>*Evans v. O. S. L. R. Co.*, 37 Utah 431, 108 Pac. 638, Ann. Cas. 1912C, 259.

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Walter Brostrom, Bernard Brostrom, and Blenda Brostrom, as minor children of said deceased and said Anna, brought this action against the defendants to recover damages for the death of said Niels Brostrom. After alleging the relationship of the plaintiffs to each other and to the deceased, and the corporate capacity of the defendants, the plaintiffs, in substance, alleged that on the 4th day of October, 1912, the Blacksmith Fork Light & Power Company, hereinafter called power company, as the owner, and the Lynch-Cannon Engineering Company, hereinafter styled engineering company, as contractor, were engaged in the construction of a certain brick building to be used as a power house by said power company; that on the date aforesaid the deceased was in the employ of said power company and said engineering company; that in said employment it was the duty of said deceased to mix and carry mortar to the brick masons who were working on said building, and while he was so employed, and while "in the act of carrying mortar across and over one of the scaffolds erected by said defendants, and while the said Niels Brostrom was performing the labor demanded of him by the defendants, the said scaffold, upon which the said Niels Brostrom, deceased, was passing, then and there gave way, and a board on the same broke, and the said Niels Brostrom, deceased, was then and there thrown from said scaffold" and fell about thirty feet upon an iron beam, by reason of which fall he sustained bodily injuries, from which he died on said day; that the defendants, and each of them, were careless and negligent in failing to provide said deceased with a reasonably safe place to work, and that they negligently and carelessly failed to construct a safe scaffold in that they failed to construct it of material of sufficient strength to bear the weight of the deceased, and that the defendants negligently failed to warn the deceased of the dangerous condition of said scaffold, and that by reason of said negligence and the death of said Brostrom, which was caused by said negligence, the plaintiffs suffered damages, etc. The defendants filed a joint answer, in which they admitted their corporate capacity, admitted that the deceased "was killed at the time and place alleged," admitted that the power company was the owner of



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the building mentioned in the complaint, and that the engineering company constructed the same, admitted that the deceased was employed to assist in the construction of said building, but only as a mortar mixer. The defendants denied all other allegations of the complaint. For a further answer they averred that the deceased was employed merely to mix mortar, and that it was no part of his duty to carry the same to the masons working on said building, and therefore he had no occasion to, and was not required to, go upon the scaffold mentioned in the complaint; that said deceased, "while not in the performance of any work for which he was employed \* \* \* entered said building and was passing over and along or upon the scaffolding thereof wholly voluntarily, and that while attempting to pass over and upon a part of said scaffold or platform, \* \* \* and at a place where said deceased had no right to be, he carelessly and negligently attempted to use said scaffold and a board thereof, and that the same broke and fell," and that the injuries to said deceased were caused by falling from said scaffold, and without any fault on the part of the defendants. The defendants also pleaded a settlement and accord and satisfaction and release from the widow, to which she replied by confessing and avoiding it upon the ground of fraud, etc. A trial resulted in a verdict and judgment for all of the plaintiffs against both defendants, and they appeal.

At the conclusion of plaintiffs' evidence the defendants moved for a nonsuit, which was denied, and, at the conclusion of all the evidence, they moved for a directed verdict, which was also denied, and they now assign the court's ruling in that regard as error.

As an illustration of the divergent views entertained by counsel for the respective parties, we remark that upon the one hand counsel for the defendants insist "that, under the uncontroverted evidence, the motion for a directed verdict should have been granted," while counsel for plaintiffs is convinced that not only should the judgment be affirmed but that the appeal is so clearly without merit "that a penalty ought to be added for the frivolity of the appeal." Under these circumstances, it is not likely that we shall succeed in

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changing the judgment of either party. Be that as it may, however, we must assume the responsibility of determining what the result shall be.

Two of the principal grounds upon which both motions were based were: (1) That the plaintiffs had failed to prove any negligence on the part of the defendants, or either of them; and (2) that there was not sufficient evidence to authorize a finding that the deceased was employed to carry mortar to the masons working on the scaffold, but that, upon the contrary, the evidence was to the effect that in carrying the mortar, and in going upon the scaffold, he was acting beyond the scope of his employment, and hence defendants did not owe him the duty of providing a reasonably safe scaffold to go upon. It is at least tacitly conceded that there were perhaps some facts produced in evidence from which the jury could infer negligence, and from which they might also infer that the deceased, if not directly, yet that he was impliedly, employed to carry the mortar to the masons working upon the scaffold at the time of the accident. What we have just said is made apparent from the motion for a directed verdict. Counsel based that motion, stating it in their own language, upon the ground that:

"There is only \* \* \* an inference of employment for the particular purpose in which the deceased was employed at the time, to wit, in carrying mortar, \* \* \* and that there is absolutely no evidence that he was employed for that purpose, except by inference, and that inference has been overcome by the absolute, positive, and uncontradicted testimony on the part of the defendants; further that there is no evidence of negligence upon the part of the defendant companies, except possibly by some inference, and that such inference, if it be indulged in, is entirely overcome by the absolute, positive and uncontradicted evidence on the part of the defendants."

In view of counsel's contention that there is not sufficient evidence to justify a finding that the deceased, at the time of the accident, was employed by the defendants to carry mortar, and that in doing that work he acted beyond the scope of his employment, we have taken the pains to carefully read all

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the evidence produced at the trial, all of which is preserved in a bill of exceptions. After reading the evidence, we are forced to the conclusion that, from all the facts and circumstances before the jury, they were authorized to find that the deceased was not acting beyond the scope of his employment in carrying the mortar to the masons. It is impractical to set forth in detail all the evidence bearing upon that subject. It must suffice to say that at the trial it was frankly admitted by the manager or superintendent of the defendants, who was in charge of the building operations, that at the time of the accident the workmen were all engaged in completing the building, and, in furtherance of that object, some of them were doing one thing and some another, so that but very few were directly engaged in the particular line of work in which they had been engaged during the actual construction of the building. So far as the deceased was concerned, assuming that he was employed as a mortar mixer only, yet he had mixed and prepared all the mortar that was needed to complete the building, but it had not all been distributed to the masons, and could not be, except as they needed it to fully complete the walls by filling in the so-called putlock holes which were left by removing certain portions of the scaffold which extended into the brick walls. Under the supervision of the superintendent, some at least of the mortar carriers were engaged in taking down scaffolds, and the deceased was thus, impliedly at least, authorized to carry, and did carry, mortar to the masons, and in doing so was required to pass onto and over the scaffold upon which was the board that broke. To carry the mortar, apparently, was the only way it could be brought to the masons, who were still working on the scaffold filling up the putlock holes, as aforesaid. The jury, therefore, were authorized to infer from the superintendent's own statement that the different workmen employed at and about the building not only had a perfect right to do what was necessary to be done in order to complete the same, but that it was really expected of them, and the deceased was no exception to the rule. It might just as well be contended that, because one of the mortar carriers had been injured through the defendants' negligence in taking down

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a scaffold, he could not recover, because he was not expressly told to do that, and hence was acting beyond the scope of his employment, which was to carry mortar and not to take down the scaffold.

Upon the question of defendants' negligence, the same conditions, practically, prevail. Here again the facts and circumstances are of that nature which authorizes conflicting inferences. The contention that there is no evidence of negligence, except the happening of the accident (that is, the deceased's fall and consequent injury) cannot pre- 1  
vail. The evidence is positive that the deceased was upon the scaffold and was passing mortar to two masons as they needed it to fill the putlock holes in the wall. He was but a few feet from both of them when he fell. One heard the sound of the breaking board, and, on turning his head, saw the deceased fall down between the two two-inch planks that were on this scaffold, and which were about three feet apart, and upon one of which the mason was working. He, in substance, testified that the deceased was in the act of falling, and was between two pieces of board, which had been apparently severed by breaking, and which were falling with him, one behind his body and the other in front of it. The board, the witness said, was broken, and was falling in the shape of a V; the deceased being between the pieces. He further said that the lower ends of the two pieces of board were about two and one-half or three feet apart. The board which broke and fell with the deceased was one inch thick, while the scaffold floor, as originally laid, was composed of planks two inches thick. The jury, therefore, had a right to infer that a board of insufficient strength was used on the scaffold; that the deceased, while in the discharge of his duty, stepped upon it; and that it was too weak to sustain his weight, and broke, thereby causing him to fall down upon an iron beam which caused the injury, from which he, in a few hours thereafter died. From the fact that such a weak board was used, the jury could also infer negligence on the part of the defendants, whose duty it was to prepare and maintain the scaffolds so long as they were needed by the masons. It is true that the evidence of negligence is not strong, and the writer is free

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to admit that if he were sitting as a juror, and were passing upon the weight of the evidence, he would be inclined to find that negligence had not been established by a preponderance of the evidence. We are, however, prohibited from weighing the evidence, and all we can do is to determine whether there is some substantial evidence, either direct or indirect, to support the finding. In our judgment there is at least some substantial evidence in support of the finding of the jury. That the evidence may be weak cannot change the result. We cannot interfere any more where the evidence is weak than we can where it is strong, so long as there is some substantial evidence to support the finding of the jury. The evidence is conclusive that it was the duty of the defendants to provide the scaffolds for the workmen who had occasion to go upon them in erecting the building. The evidence is also clear that the defendants undertook to perform that duty. The superintendent further testified that, at the time of the trial, there were at least some of the men who worked about the building and scaffold in question still in the employ of the defendants, yet no effort whatever seems to have been made to produce a witness who could have explained or have given some reason how or why the board which broke came to be placed on the scaffold.

Where an inference of negligence arises from certain facts and circumstances, the inference may be strengthened by reason of the failure to offer any explanation by those who are responsible for the conditions out of which the accident has arisen. The jury may have thought that, under all the circumstances, the duty was cast upon the defendants to offer some explanation with regard to how or why or 2 by whom the board was placed upon the scaffold. There were a large number of facts and circumstances which the jury had a right to consider in determining the question of negligence. In view, however, of the mass of evidence which we would have to refer to in order to make the fact self-apparent, we shall not attempt to go into detail, but content ourselves with the foregoing statements.

It is obvious from what has been said that the facts and circumstances of this case do not bring it within the rule an-

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nounced in *Christensen v. Railroad Co.*, 35 Utah, 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159, and *Richards v. O. S. L. R. Co.*, 41 Utah, 99, 123 Pac. 933, as contended for by defendants' counsel. In those cases conflicting inferences were unauthorized for the reasons there pointed out. The reverse is true in this case.

It is also contended that the court erred in charging the jury:

"That it was the duty of the defendants to use reasonable or ordinary care to keep the premises about which the plaintiff (deceased) was employed in a reasonably safe condition."

This, it is contended, was error, because it made defendants liable, although the relation of master and servant, with respect to the particular work which the deceased was doing, did not exist. We doubt whether, by reading the whole of the instruction, it is open to such a construction; but, assuming it to be so, yet that question was abundantly guarded in other instructions, so that the jury could not have been misled. Indeed, the court, in terms, told the jury that, unless they found that the deceased was working within the scope of his employment, plaintiffs could not recover.

It is next contended that the court erred in withdrawing from the jury the question of contributory negligence. We have read the record carefully, and we can find no evidence whatever, either direct or indirect, upon which a finding of contributory negligence on the part of the deceased could be based. The only claim upon which to base contributory negligence, stating it in counsel's own language, is:

"That under the record in this case the jury had a right to determine \* \* \* as to whether or not the deceased was negligent in being on the scaffold at the time and place and when the same was being torn down."

The mere fact that the deceased was on the scaffold to serve the masons, it is said, might have constituted negligence. Had assumption of risk been pleaded and relied on, there might be something in the contention that the deceased assumed the

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risk, but how he, under the facts and circumstances of this case, could have been guilty of contributory negligence by going upon the scaffold which was prepared and intended for that purpose, and upon which at least two masons were working at the time, we cannot understand. If the jury in this case had found the deceased guilty of contributory negligence, we cannot see how the finding could be supported by any substantial evidence.

The last assignment to be considered relates to the damages which the jury awarded the plaintiffs. It is contended that, under the evidence, the damages allowed are not only excessive, but that there is no evidence justifying any substantial damages. Upon this question, the evidence is to the effect that the deceased, at the time of his death, was 5 sixty-one years of age; that he had been married to the plaintiff Anna Brostrom thirty-two years; that they had reared a family of seven children, four of whom were minors, two boys and two girls, aged eighteen, fifteen, fourteen and eleven years, respectively; that the deceased was a kind husband and father; that he was sober and industrious, and of excellent health; that he was practically constantly employed for a period of nine months in each year at a wage of between three dollars and four dollars per day, and that at the time of his death he was earning \$3.75 per day; that the deceased and his wife owned one and three-quarters acres of land in Ogden City, with a dwelling house thereon; that the land and dwelling house constituted their homestead and was of the value of about \$4,000, and that they had very little of any other kind of property; that his wife and minor children were dependent upon him for their support. Under our statute (Comp. Laws 1907, Section 2912) the jury, in a case like the one at bar, may award "such damages \* \* \* as under all the circumstances of the case may be just." In *Evans v. O. S. L. R. Co.*, 37 Utah, 431, 108 Pac. 638, Ann. Cas. 1912c, 259, we took considerable pains to point out what particular elements a jury may consider under the section in question in determining the amount of damages that should be allowed in a case where the wife and children are bereft of the assistance and advice of the husband and father. That

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case was somewhat exceptional with regard to the amount that was allowed. There was ample evidence in that case, however, to sustain the verdict of the jury. While we cannot agree with counsel in this case that there is no evidence upon which to predicate the allowance of substantial damages, yet we must concede that the evidence is not as satisfactory as it might be, in view of the amount allowed by the jury, namely, \$5,300. But here again we, under our Constitution and statutes, are permitted to interfere only where it is apparent that the jurors were controlled by passion or prejudice, and where the trial court, upon a motion for a new trial upon the ground of excessive damages, has abused its discretion in permitting the amount of the verdict to stand. What is a reasonable amount to be allowed for the death of the husband and father, under the circumstances disclosed by this evidence, is a subject upon which reasonable men may differ. The mere fact that a wife and children are bereft of the husband and father, without more, may support and justify substantial, as contradistinguished from nominal, damages. What the amount should be no doubt depends upon circumstances and conditions. While those circumstances and conditions should be made to appear by proper evidence, yet how can it be determined, as a matter of law, in each case, just what evidence should be adduced? Here we have a case where jurors may entertain divergent views with respect to the amount that should be allowed the widow and children. There is absolutely nothing in this record, except the amount allowed, from which it can be ascertained that the verdict is based upon either passion or prejudice, or both. Nor is there anything made to appear from which we can determine that the trial court abused its discretion in sustaining the amount found by the jury. While, in our judgment, the amount allowed is quite large, and, in the judgment of the writer, seems excessive, yet we can see nothing in the record which justifies us to say that the verdict is manifestly illegal because based upon passion or prejudice, or both, or that the trial court abused its discretion as indicated. In view of this, we have no right to disturb the verdict merely because it is



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for a greater amount than in our judgment it should have been. If we disturbed verdicts every time they are contrary to our judgment, litigants would have to abide by our judgment regarding such matters, when the law provides that the judgment they must abide by is that of the jurors.

For the reasons stated the judgment is affirmed, with costs. STRAUP, C. J., and McCARTY, J., concur.

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KNUDSON et al. v. HULL et al.

No. 2693. Decided April 22, 1915 (148 Pac. 1070).

**FISH—GAME—PRIVATE RIGHTS.** Though defendants confessedly were entitled to hunt and fish in a river, that right does not entitle them when plaintiffs' property is covered with water to hunt and fish on the water submerging plaintiffs' land.

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Charles W. Knudson and John C. Knudson, partners doing business as Knudson Bros., against James Hull, Sr., and another.

Judgment for defendants. Plaintiffs appeal.

REMANDED with directions.

*Johnson & Johnson* for appellants.

*Wm. E. Davis* for respondents.

STRAUP, C. J.

The plaintiffs, in Box Elder County, are the owners of about 18 or 20 sections of land along the mouth of Bear River. The river is a natural stream having its source in Utah, flowing north through parts of Wyoming and Idaho, and then south through Utah, and emptying into Great Salt Lake. Most of the lands are low, swampy, and marshy, and not suitable for anything except grazing, hunting and fishing. The action

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is to restrain alleged trespasses. The defendants disclaim any right to enter upon the lands. The action was dismissed as to Hull, Jr. The record shows that the other defendant for several years, in hunting and fishing, entered and trespassed upon the lands by walking and driving over and camping on them. He claims no right to do that. On the other hand, it is conceded that he had the right to hunt and fish on the river. Portions of the year the waters of the river along the lands for some considerable distance overflow and spread over the lands, rendering them swampy and marshy, causing on them sloughs, lakelets, and surface waters.

What divides the parties is this: The defendant, while disclaiming any right to go upon the lands, that is, to walk or drive on them, yet claims the right to go on them anywhere to hunt and fish where the waters of the river have spread over the lands, and thus, in that way, claimed the right to hunt and fish on the waters so spread over or coursing through the land. The plaintiffs claim that defendant's right to hunt and fish was restricted to the waters of and in the natural channel of the river, and that it did not extend beyond that.

The judgment of the court below is, that the defendant "be, and he is hereby, forever enjoined and restrained from camping, fishing, and hunting upon plaintiffs' said lands, other than upon the waters of Bear River, including its navigable channels, branches, and sloughs, and the beds thereof." All channels and waters were regarded "navigable" on which a row or motor boat could be propelled. The plaintiffs appeal. Both parties regard the judgment as an adjudication, granting to the defendant the right to hunt and fish as claimed by him. We shall so regard it. So regarding it, we think the judgment wrong. The defendant's right to hunt and fish on the river may be conceded. That, however, does not give him the right to hunt and fish on waters on plaintiffs' lands, caused by overflows, or on sloughs, marshes, lakelets, or other waters on the lands, not a part of the natural channel of the river. That ought to have been the judgment.

The case is therefore remanded, with directions that such a judgment be entered. Costs to appellants.

FRICK and McCARTY, JJ., concur.

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## HATCH v. HATCH.

No. 2688. Decided May 6, 1915 (148 Pac. 1096).

1. COMMON LAW—HUSBAND AND WIFE—PROPERTY OF WIFE—ADOPTION BY TERRITORY—STATUTE. When Congress, in 1850, by adopting the Organic Act for the government of the territory, provided in the last section that the Constitution and laws of the United States were thereby extended over the territory so far as the same might be applicable, that system was extended which generally prevailed in the country, and the old English common law, with its rigorous limitations imposed upon women by the status of marriage, was not adopted, but only so much thereof as was applicable to the conditions of the new territory, which recognized the equitable right of a married woman to a separate estate.<sup>1</sup> (Page 127.)
2. HUSBAND AND WIFE—PROPERTY OF WIFE—RECOVERY—LACHES OF WIFE. Where the administrator of a wife sued to recover from the executors of her husband's property alleged to have been the wife's separate estate, and where the delay in asserting the right was less than the period of limitations, and it did not appear that the delay worked any disadvantage, dismissal of the complaint on the ground of laches was improper.<sup>2</sup> (Page 129.)
3. LIMITATION OF ACTIONS—PROPERTY OF WIFE—RECOVERY—PLEADING. Where an administrator of a wife sued the executors of her husband to recover property alleged to be her separate estate, and the allegations of the complaint, while showing lapse of time in excess of the statute of limitations, set up no demand and refusal, ouster, hostile assertion, or holding on the part of the husband against the wife, while asserting cotenancy, the married relation, and other trust or fiduciary relations against which the limitations do not run until demand and refusal, ouster, or open repudiation, the complaint was not demurrable. (Page 129.)
4. LIMITATION OF ACTIONS—SUSPENSION OF STATUTE—DEATH AND ADMINISTRATION—EFFECT. Causes of action which accrue to the

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<sup>1</sup>*First National Bank v. Kinner*, 1 Utah, 100; *Adams v. Union Pacific Railroad Co.*, 1 Utah, 232; *Henderson v. Adams*, 15 Utah, 30, 48 Pac. 398; *Hilton v. Thatcher*, 31 Utah, 360, 88 Pac. 20; *People v. Green*, 1 Utah, 11.

<sup>2</sup>*Hamilton v. Dooly*, 15 Utah, 280, 49 Pac. 769.

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administrator after the death of an intestate are not complete and do not exist, so that limitations can begin to run upon them until the administrator is appointed who can bring suit. (Page 130.)

5. EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTMENT—STATUTE. Suit by the administrator of a wife against the executors of her husband to recover her separate estate was not of such character as to require presentment of claims to such executors within the provisions of the probate laws. (Page 131.)

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Suit by Joseph Hatch, as administrator of the estate of Permelia Jan Hatch, against Ruth Hatch and Abram C. Hatch as executors of Abram Hatch.

Judgment sustaining demurrers to the complaint. Plaintiff appeals.

REVERSED, AND CAUSE REMANDED, with directions.

*W. S. Willes, J. W. N. Whitecotton*, and *E. A. Walton*, attorneys for appellant.

*Chas. Hatch, Rawlins, Ray and Rawlins*, for respondent.

STRAUP, C. J.

This is a case in equity. It went off on demurrers to the complaint. The ruling is presented for review.

The plaintiff's intestate and the defendants' testate were husband and wife. She died in November, 1880. An administrator of her estate was not appointed until in January, 1912. He died in December, 1911. In January, 1912, the defendants were appointed executors of his estate. They left children surviving them, who at the death of plaintiff's intestate, were twenty-six, twenty-three, twenty, seventeen and nine years of age. The complaint is in four counts. We shall refer to only so much of it as is necessary to a proper consideration of the questions involved. The first proceeds on the

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theory that the wife at her death was, and for many years prior thereto had been, "the owner of an undivided interest and share of certain partnership business or joint adventure known as the Heber Co-operative Mercantile Institution, and sometimes known as Abram Hatch & Co.'s store, which business consisted of general merchandising, money loaning, and the ownership of real and personal property, good will, and other things incidental to a co-operative store"; that he was a co-owner with her in the business, and that "at the time of the death of plaintiff's intestate and up to the time of" his death "all of said property was in the actual possession and control of" him, and that he "took, held, and retained the same as surviving partner of plaintiff's intestate"; that in March, 1888, he assigned, transferred, and made over, all the property, assets, stock, and good will of the partnership or joint adventure, to a corporation, receiving therefor 1,400 shares of the capital stock of such corporation; that he, at the time of his death, held of such shares 1,050 shares, which thereafter, and at the commencement of the action, were in the possession and under the control of the defendants; that dividends on the stock had been paid to and received by him, and after his death to the defendants, but that neither accounted for the same, and that those paid to him augmented his estate, and those paid to the defendants were held by them "in specie."

In the second cause it is alleged that in November, 1880, the plaintiff's intestate was the owner of \$120, which was recognized by the defendants' testate as a portion of her separate estate; that she then "placed the same into his hands and possession, with instructions and upon the agreement to purchase for her twelve shares of stock" of another corporation, and that he, in June, 1881, with such moneys purchased twelve shares of such stock, taking the certificate in his own name. Then it is alleged that dividends were paid upon that stock, which were received by him, and not accounted for, that he was possessed of such stock at the time of his death, and that the same at the commencement of the action was in the possession of the defendants.

In the third cause it is alleged that plaintiff's intestate at

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all times during the marriage "was possessed of a separate estate," and "during all said time the existence of said separate estate was recognized by the defendants' testate," and that "in respect of their business dealings and relations they dealt the one with the other independently as one stranger with another; that during the years 1877 and 1878 plaintiff's intestate and defendants' decedent were equal owners and tenants in common of large numbers of cattle, and while so equal owners of said cattle and during said years" he "sold therefrom a large part, and received therefor the sum of \$16,200, one-half of which belonged to the plaintiff's intestate"; that at the time of her death she and he "were the equal owners and tenants in common of a large herd of cattle, and thereafter and in the year 1882" he "sold a large number thereof and received the sum of \$28,000; \* \* \* that no accounting of payments in respect of said property and money has ever been made to" plaintiff's intestate, "or her estate, or the beneficiaries thereof, but, on the contrary, said property and money were retained by him, and reinvested by him, and the proceeds and increments arising therefrom reinvested and transmuted into other property, which defendants' decedent had standing in his name at the time of his death, and the same has come into and now is in the possession of the defendants."

In the fourth count it is averred that during the subsistence of the marriage relation he "continuously dealt with and treated plaintiff's intestate in respect of her property rights as a *feme sole*, and as being under no disability by reason of her marriage in respect of her personal earnings and personal property, and at various times entered into and engaged in joint adventures and partnerships with her as if a stranger"; that in September, 1867, she "was the owner in her own right of \$8,000 in money, a portion of her separate estate, which was turned over and delivered and intrusted to" him "as her agent for the purpose of purchasing" certain goods and merchandise for her; that with such moneys such goods were purchased by him and placed in stock in which they had a joint interest, and which later was transferred from Lehi to Heber City, and that the proceeds thereof were received by him

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and from time to time reinvested, and which property, together with the increments, was, at the time of her death, taken into his exclusive possession, and was held and retained by him at the time of his death, and which thereafter came into, and at the commencement of the action was in, the possession of the defendants.

In all of them it is alleged that under the law he, during his lifetime, was entitled to the income of one-fourth of all the property and interest owned and possessed by plaintiff's intestate, but that he, after her death, held and retained possession of the whole of her property and interest, and that he thereupon became and was a tenant in common with the beneficiaries and surviving heirs of plaintiff's intestate. In all of them it also is alleged that claims were presented to the defendants, as executors, but that each and all were rejected by them. There are also other allegations respecting relations of tenants in common, trust, and other fiduciary relations. In each there is prayer for an accounting and for equitable relief.

To all of these counts demurrers were interposed on grounds of insufficient facts, laches, and the statute of limitations, ambiguity, defect of parties, misjoinder of actions, and of variance between the claims presented and causes stated. Those chiefly urged are the first two. It is claimed no cause of action is stated in either count, because at all times stated in the complaint the English common law was in force in the territory, and that thereunder the legal existence of the wife was suspended and was merged in that of her husband, and thus she was incapable of owning, holding, or acquiring property, and that whatever property she may have had became his on the marriage and was his at the time of her death; and hence the allegations that she had a separate estate and was the owner of property at the time of her death are incompatible with law, and therefore must be disregarded.

Much is said in the briefs by appellants that the civil law, and by respondents that the English common law, was in force in the territory during all the times stated in the complaint. Utah is of territory which, in 1846, passed from the possession of Mexico into that of the United States by the

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treaty of Guadalupe Hidalgo, which terminated the Mexican War. The original territory so acquired embraced the region west of the summit of the Rock Mountains, east of California, and between the thirty-seventh and forty-second parallels of north latitude. At the time of the treaty and cession the civil law prevailed in the republic of Mexico. It continued to so prevail in the acquired and ceded territory until changed by the new sovereign. *Boitiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. 525, 32 L. Ed. 926; 1 Story on the Constitution, Section 150. A provisional government was established in the territory by its people in 1849. There is nothing in that to show that the English common law was established by them. In 1850 Congress created the acquired territory into a temporary government by the name of the Territory of Utah, and passed what is known as the Organic Act for the territorial government of Utah Territory. Later Nevada, portions of Idaho, and of Wyoming and Colorado, and other territory, were carved out of Utah Territory. The last section of the act reads:

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah so far as the same or any provision thereof may be applicable."

By that it is claimed on the one side, and denied on the other, that Congress extended over or transplanted the English common law into the territory so acquired from Mexico. There are no other enactments on the subject, either by Congress, the territorial Assembly, or the state Legislature of Utah, until 1898, when the state Legislature adopted this (R. S. 1898):

"The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution or laws of this state, shall be the rule of decision in all the courts of this state."

Not until then was the common law of England adopted in this territory or state by any positive enactment. In California, where, too, its territory was originally acquired from Mexico, it was held that the civil law prevailed until the adoption of the common law by the first session of the Legislature



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in 1850. *Norris v. Moody et al.*, 84 Cal. 145, 24 Pac. 37. So, too, in Colorado. That court in *Herr v. Johnson*, 11 Colo. 393, 18 Pac. 342, said:

"The common law of England had never obtained in this portion of the North American continent previous to its acquisition by our general government. This portion of our country was never under British dominion. The acquisition thereof was by treaty and purchase long after the Revolution, and from powers not having the common law, but the civil law; so that first the foothold or actual existence of the common law of England here was necessarily by legislative enactments, and necessarily limited according to the expression of such enactments."

In *Ward v. Broadwell*, 1 N. M. 75, the court said:

"The treaty of peace, by the cession of New Mexico to the United States, changed the jurisdiction and sovereignty over this territory from the republic of Mexico to the United States. But it had no effect, nor was it intended to have any effect, upon the system of government prevailing or laws in force at the time of the cession. It has been well settled by the authority of adjudged cases that the laws, usages, and municipal regulations in force at the time of the conquest or cession remain in force until changed by the new sovereign."

This is not disputed. But the language of the Organic Act is pointed to as an enactment adopting in the Territory of Utah the English common law. The decisions as to this are, to say the least, confusing, for in most of them what was said on the subject was either dicta or left the matter in doubt. *First National Bank v. Kinner*, 1 Utah, 100, is cited as an authority that the English common law was by the Organic Act extended into the territory. Justice Emerson, who wrote the opinion, seemed to entertain the view that it could not be assumed that any specific body of the common law was transplanted into the territory, but that the people of the territory tacitly agreed upon maxims and principles of the common law suited to their conditions and consistent with the "Constitution and laws of the United States." But neither Justice Boreman nor Justice McKean, who participated in the decision, went even that far. Notwithstanding this, Justice Lowe, in *Thomas v. U. P. R. R. Co.*, 1 Utah 232, declared that

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the Bank-Kinner Case unqualifiedly decided "that the common law was a part of this territory." So, in *Henderson v. Adams*, 15 Utah 30, 48 Pac. 398, was it assumed that the common law, in a way and to an extent, was in force in the territory. But the opinion is guarded, for the court had in hand a rule—the statute of uses—confessedly not a part of the English common law. That may also be said of the two preceding cases. In *Hilton v. Thatcher*, 31 Utah 360, 88 Pac. 20, it is declared:

"The common law has been in force in the state of Utah at all times since the Organic Act of 1850."

*People v. Green*, 1 Utah 11, is cited as an authority for that. In the Green Case a conviction was claimed to be bad because the grand jury finding the indictment was not selected as provided by the territorial laws. Justice Drummond held it good, on the ground that the procedure adopted by the territorial Legislature respecting the selection of a grand jury was in conflict with the Organic Act, and for that reason bad. But that was repudiated by the Supreme Court of the United States in the case of *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 20. The *Hilton-Thatcher Case*, restricted to the question before the court, is well considered and grounded, and properly decided. That is not doubted. The case involved questions of marriage relations between one Park and a Mrs. Hilton, and her alleged rights as a widow in and to real property possessed and conveyed to him during coverture. They were married in December, 1872. He died in 1900. She, as his widow, claimed an interest in real property possessed and conveyed by him in 1888 without her release or joining in the conveyance. The determination of the case largely depended upon the acts of the territorial Assembly, of Congress, and of the state, principally the territorial act of February, 1872 (Comp. Laws 1876, p. 342), the congressional act of 1887 (Comp. Laws 1888, p. 119), and acts of the state Legislature of 1898 (Rev. Stat. 1898, Section 2826), relating to married women. They all are referred to in the opinion. True, we assumed—all the members of the court did—that the common law, except as modified by legislative

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enactment, was in force in the territory in 1888, when the conveyance was made. But that was unnecessary to the decision, for the congressional act of 1887 provided that:

“A widow shall be endowed of third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she shall have lawfully released her right thereto.”

And from a reading of the opinion it is apparent that what was awarded the widow was grounded on congressional acts and statutory provisions, and not on common law rules. Perhaps the Supreme Court of the United States best put the matter in the case known as *Mormon Church v. United States*, 136 U. S. 62, 10 Sup. Ct. 792, 34 L. Ed. 481. There the court said:

“But it is apparent from the language of the Organic Act, which was passed September 9, 1850, \* \* \* that it was the intention of Congress that the system of common law and equity which generally prevails in this country should be operative in the Territory of Utah, except as it might be altered by legislation. \* \* \* In view of these significant provisions, we infer that the general system of common law and equity, as it prevails in this country, is the basis of the laws of the Territory of Utah.”

This is far from asserting that the common law of England was intended to be extended over or was transplanted into the territory. True, as stated in 8 Cyc. 369:

“The greater part of the common law in the United States is derived from the common or unwritten law of England.”

And while in a sense, there is no common law in the United States—for what is common law in one state is not necessarily so in another—yet, when terms are used, “the common law as recognized in the United States,” or which “generally prevails in this country,” we speak of it and use it in a different sense from that of “the common law of England.” *Browning v. Browning*, 3 N. M. (Gild.) 659, 9 Pac. 677. This is so, for it is generally recognized that wherever, in this country, the English common law was adopted, it was adopted only so far as new conditions and surroundings rendered it applicable, except where it was adopted by positive enact-

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ments. But nowhere in this country, except by positive enactments, was the English common law fixed and immutable; not even in England. Thus, in an early day, Justice Story, in *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374, said:

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

This is familiar doctrine. How often has it been applied in this Western country to riparian rights; elsewhere to descent where the civil and not the English common law, was followed; to ancient lights and property rights of a *feme covert* where partly the English common law and partly the civil law was followed. The old English common law was universally rejected in this country, wherever and whenever it was regarded as being repugnant to the spirit of our laws, and when not in conformity with the general policy of our government and institutions. Under the old English common law and the early Roman law, the marital power of the husband was absolute. The wife had no legal existence apart from that of her husband. She could neither acquire nor hold property, and was not capable of doing anything as a *feme sole*. He, on the marriage, became the possessor of her property, and had the right to sell her services and to chastise her. In return, he was made liable for her debts, torts, misdemeanors, and crimes, except treason and murder. During a later period of the Roman law, and under the doctrine of consensual marriage, the husband and wife were regarded as partners. He had the right to choose the domicile, regulate the household expenses, and the right to the custody of the children; but he had no legal control of her actions, nor over her property. She had a legal existence separate and distinct from his, and had the right to own and hold property, to sell and dispose of it, and to manage her own estate and affairs. That doctrine equity recognized and enforced from an early day both in England and in this country.

In 21 Cyc. 1144, it is said:

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"In equity, under the influence of the later Roman law, and long before the changes effected by modern legislation, the wife's individual existence was recognized, and her right to enjoy, control, and dispose of her separate estate was enforced through chancery's extraordinary jurisdiction over the property of married women."

Bishop, in his work on the Law of Married Women (Section 16), commenting on the antagonism of the common law and equity respecting rights of married women, remarked:

"It is a curious phenomenon in our jurisprudence, as derived from the mother country, that it should contain two separate and somewhat antagonistic series of principles, the one of which is peculiar to one class of tribunals and the other to another, so that, if a controversy is decided in one class of courts the result will be one way, and if in another class it will be directly the other way. There is no such antagonism between the common law and the law administered in the ecclesiastical courts as between it and equity. Neither between the common law and equity is the antagonism complete; for it is one of the maxims of the tribunals in which the latter is administered, that equity follows the law. The meaning of which maxim may be explained to be that it follows the law in its rules of decision when it does not choose to follow different rules of its own."

At an early day Justice Story, in his work on Contracts (Section 84), repudiated the English common-law rule relating to married women thus:

"In respect to the powers and rights of married women the law is by no means abreast of the age. Here are seen the old fossil footprints of feudalism. The law relating to married women makes every family a barony, a monarchy or a despotism, of which the husband is the baron, king or despot, and the wife the dependent, serf, or slave. That this is not always the fact is not due to the law, but to the enlarged humanity, which spurns the narrow limits of its rules. The progress of civilization has changed the family from a barony to a republic but the law has not kept pace with the advance of ideas and customs. And although public opinion is a check to legal rules on this subject, the rules are feudal and stern, yet the position of woman throughout history serves as a criterion of the freedom of the people of the age. When man shall despise the right which is founded only in might, woman will be free, and stand on an equal level with him, a friend and not a dependent. Unity of man and wife can never be created by law, but by nature; and where there is discord, no legal rules can create harmony. The first step in any reform on this subject is to enable a married woman to hold

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property independent of her husband without intervention of a trustee, which is only an awkward and useless form, the tendency of which is to create ill feelings and distrust between the married persons. No bad result can follow from enabling woman to hold what is her own; but, while the fact of marriage entitles the husband to the fortune of the wife, he has her entirely at advantage, and may abuse his power to her injury. Besides, this rule of law offers inducements perpetually to marriages for money, instead of affection, and is therefore at variance with good policy as with morals. The only reasons by which it is supposed are feudal, and are adverse to the spirit of freedom."

Now, when Congress in 1850 by the Organic Act extended over the Territory of Utah, and declared to be in force therein, "the Constitution and laws of the United States," it is hard to believe that it thereby intended that all the 1 harshness and rigor of the old English common law with respect to married women, rendering her a legal non-entity, incapable of owning, holding, or doing anything, "a child of her husband, and legally a sister of her own offspring," should be and was put in force in the territory, a doctrine which then fast was becoming obsolete even in England, which never was in all its rigor recognized in the United States, which was wholly unsuited to our civilization and government and our people, and which never was recognized or enforced in equity either in this country or in England. Our conclusion, therefore, is that, while Congress, by extending over the Territory of Utah the Constitution and laws of the United States, put in force, in the language of the Supreme Court of the United States, "the system of common law and equity which *generally prevails in this country*," yet did not so extend or transplant the *common law of England*, with all its rigor and harshness, but only so much of it as was and had been generally recognized and enforced in this country, and as is and was suitable to our conditions. There is much to support the view that when the colonists left Great Britain they brought with them and adopted, so far as suitable to their new conditions and surroundings, the usages and customs then prevailing in Great Britain. There is no good reason, however, for saying that as to those who migrated from the states and settled in territory never under British domin-

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ion. During all the times stated in the complaint, and during the marriage, from 1867 to 1880, the old English common law relating to married women, with all its rigor and harshness, was neither recognized nor enforced in the states. Nearly all of them, in such respect, had laws and married women's acts in controvention of the English common law. Then we look to the legislative enactments of the territorial Assembly. As early as 1852, any person, including a married woman, of age, and of sound mind, was capable of disposing of property by will. Both parents inherited from their children. Husband and wife inherited from each other. As early as 1876, perhaps earlier, at least four years prior to the death of plaintiff's intestate, it was enacted by the territorial Assembly:

"That a married woman may convey any of her real estate, or any interest therein, by conveyance thereof, executed and acknowledged and certified in the same manner as provided in this act for other persons."

At the same time it was provided that:

"When a married woman is a party, her husband shall be joined with her; except that (1st) when the action concerns her separate property she may sue alone; (2nd) when the action is between herself and her husband she may sue and be sued alone," and "if the husband and wife be sued together the wife may defend in her own right."

At the time of her death, and prior thereto, by the territorial law of descent, it was provided that if the decedent leave a husband or wife "and more than one child, or one child and the issue of one or more deceased children living, the estate goes one-fourth to the surviving husband or wife, for life, and the remainder with the other three-fourths, to the surviving children and the issue of any deceased children by right of representation." In view of these, and of other similar acts of the territorial Assembly, it is difficult to maintain that during the marriage, and at the death of plaintiff's intestate the English common law as to married women was in force in the territory, to the extent that she had no legal existence and was incapable of holding, owning, or disposing of property. For these reasons, and since the action invokes

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equity and calls for chancery jurisdiction involving fiduciary relations, and property rights between, and separate property and estates of, husband and wife, and since equity, both in this country and in England, recognized the wife's legal existence and enforced her right to enjoy, control, and dispose of her separate estate, we think the complaint not bad on the alleged ground of want of capacity of plaintiff's intestate to own, hold, and acquire property during the marriage, and that at her death "her estate," under the territorial law of descent, went one-fourth to her surviving husband for life, and the remainder, with the other three-fourths, to her surviving children. In no other respect is the complaint challenged for want of facts.

Now as to laches: Numerous cases from the federal courts are cited to the effect that equity often treats lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar on the ground of discouraging 2 stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right. But federal courts as chancery courts are not controlled by statutes of limitations. *Miles v. Vivian*, 79 Fed. 848, 25 C. C. A. 208. Generally, in the state courts, the statute of limitations applies to equitable as well as legal actions, and, in the absence of an estoppel or prejudice, mere lapse of time short of the statute of limitations does not bar relief. *Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Thomas v. Holmes*, 142 Iowa 288, 120 N. W. 636; 5 Pomeroy Eq. Jur., Section 21; *Lindell v. Lindell*, 142 Mo. 61, 43 S. W. 368; *Hawley v. Von Lanken*, 75 Neb. 597, 106 N. W. 456; *Farr v. Hanenstein*, 69 N. J. Eq. 740, 61 Atl. 147. On the face of the complaint it does not appear that the delay works a disadvantage, becomes inequitable, or operates as an estoppel against the assertion of the alleged rights.

Now as to the statute of limitations: The appellant asserts that the alleged rights are not barred because of the allegations respecting cotenancy, the relation of husband and wife, and of other trust and fiduciary relations, against 3 which the statute does not run, until demand and



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refusal, or ouster, or open repudiation, or open assertion or an exercise of a dominion, so hostile and adverse as to amount to an ouster or repudiation. The authorities sustain such view. *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82; *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070; *Ballou v. Ballou*, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733; *Robinson v. Robinson*, 173 Mass. 233, 53 N. E. 854; *Rucker v. Maddox*, 114 Ga. 899, 41 S. E. 68; *Boughton v. Flint*, 74 N. Y. 476; *Bartlett v. Wright*, 29 Ill. App. 339; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Dresser v. Travis*, 39 Misc. Rep. 358, 79 N. Y. Supp. 924.

Again, there is nothing appearing on the face of the complaint to show any such demand and refusal, repudiation, ouster, or hostile assertion or holding. The respondents contend that such ought to be conclusively presumed from the mere lapse of time and sole possession. We think not. The cases cited do not so broadly teach that. They hold that long delay and sole possession without an accounting is proper evidence from which an adverse possession, ouster, hostile holding, or repudiation may be inferred. *Freeman, Cotenancy and Partnership*, Art. 242; *Frederick v. Grey*, 10 Serg. & R. (Pa.) 188; *Lefavour v. Homan*, 3 Allen (Mass.) 355. Such, however, is not conclusively presumed as matter of law, but, depending upon the circumstances of the parties and the particular facts of the case, may be inferred and found as matter of fact.

Further, the general rule, as stated in 18 Cyc. 4915, is:

"Where a cause of action accruing to testator or intestate is barred by the general statute of limitations in his lifetime, his personal representative cannot recover thereon, although decedent died on the last day of the statutory period and the representative sued shortly after his death. As respects causes of action arising in decedent's lifetime, but not barred by the general statute of limitations at the time of his death, it is well settled that his death does not interrupt the running of the statute, in the absence of some statutory provision to the contrary, and it has been held that the fact that the administrator is ignorant of the cause of action does not affect the rule. A cause of action which accrues to an administrator after the death

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of an intestate is not complete, and does not arise and exist, so that the statute of limitations can begin to run upon it, until an administrator is appointed who can bring suit."

Such latter rule prevails in twenty or more different jurisdictions, including that of the Supreme Court of the United States, and is the rule in England. We believe it to be the weight of authority, though there are a few cases to the contrary. There are matters alleged in the complaint which relate to "causes of action arising after the decedent's death," and clearly as to those the action is not barred.

The only other point here urged is that the causes stated in the complaint do not conform to the claims as presented to and rejected by the defendants. Perhaps all that need be said as to this is that the actions are not of such 5 character as to require presentation of claims within the meaning of our probate provisions. *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Gillett v. Hickling*, 16 Ill. App. 392; *Probate Court v. Williams*, 30 R. I. 144, 73 Atl. 382, 19 Ann. Cas. 554; *Gunter v. Janes*, 9 Cal. 643. We are of the opinion that the ruling sustaining the demurrers was wrong.

The judgment of the court below is therefore reversed, and the cause remanded, with directions that the case be reinstated and the defendants given leave to answer. Costs to appellant.

McCARTY, J., concurs.

FRICK, J.

I concur in the result. I do not concur, however, in all that is said, or may be implied from what is said, upon the question of whether the common law of England or the so-called civil law was in force in the Territory of Utah from and after the adoption of the Organic Act in 1850 by Congress. I am of the opinion, and have always entertained the opinion, that since that act went into effect the common law of England, with certain exceptions and modifications, was in force in the Territory of Utah until modified by the laws enacted in the Territory and State of Utah. When that act was adopted, the territory, with the exception of a small number of settlers

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from the eastern states, was a wilderness unknown to civilized man. That act was adopted as a basis of government for the few people who came from the states where the common law in a modified form, and not the civil law, was in force. Laws, whether written or unwritten, are intended to govern and control the rights and actions of civilized men; and they, under a system of government like ours, may adopt their own laws and be governed by them. They could thus conform their actions to the principles of the common law in their domestic and other affairs without passing statutes, and it does not follow that they could not conform to a known system of laws before they enacted statutes; and this, in my judgment, is just what was done in the Territory of Utah. Besides, the first settlers of Utah must have been in sympathy with the principles of the common and not with those of the civil law, and hence had every reason to adopt and to be controlled by the principles of the former and not by those of the latter. Moreover, I think that it was the purpose of Congress, as well as that of the settlers, that the common law should prevail in the Territory of Utah.

It is, however, not to be assumed that for that reason the common law of England was intended to be adopted and enforced in every detail and as affecting every relation of life. Nor do I think the early settlers so intended or regarded the matter. That is sufficiently illustrated by the early territorial acts referred to by Mr. Chief Justice Straup relating to the things pointed out in his opinion. But those acts are not the only evidence that the common law was adopted and followed in the Territory of Utah. The hundreds and hundreds of court decisions of both the Supreme and the lower courts furnish ample proof that what I have hereinbefore stated is correct. When, therefore, in 1897 the commissioners appointed to revise the laws of Utah incorporated into the Revised Statutes of 1898, Section 2488, in which the "common law of England, so far as it is not repugnant to or in conflict with \* \* \* the Constitution and laws of this state," was adopted as the "rule of decision in all the courts of this state," they merely readopted and declared what had already been declared by the courts many times in their decisions. It

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may be assumed, therefore, that in matters relating to the property and kindred rights of the wife, as well as in many other respects, the common law of England was modified at an early date in the Territory of Utah, and that the people and the courts so regarded it.

As to the statute of limitations I entertain serious doubts. I feel constrained, however, to resolve those doubts against the demurrer, and thus permit the trial court to hear the evidence and make findings with regard to the conduct of the husband and wife regarding the property involved and the manner in which the business affairs were conducted and carried on by the husband, so that the proper inferences may be deduced as to whether the property was held by the husband in his own right and so regarded by the wife, or whether he held it in some other capacity. What the actual facts are in that regard can be determined far better after a hearing than upon a demurrer to the allegations of a pleading.

For those reasons, I concur in the reversal of the judgment, withholding, however, any opinion upon the question of whether there is ultimately to be a recovery upon the merits.

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CHIPMAN *et al.* v. AMERICAN FORK CITY *et al.*

No. 2701. Decided May 7, 1915 (148 Pac. 1103).

WATERS AND WATER COURSES—IRRIGATION—INJURIES FROM OVERFLOW—DUTY TO REPAIR—SUFFICIENCY OF EVIDENCE. In an action for damages to realty caused by overflow from an irrigation ditch, evidence on the issue whether defendants were under duty to repair such ditch *held* to render non-suit improper.

Appeal from District Court, Fourth District; Hon. A. B. Morgan, Judge.

Action by Thomas J. Chipman and Stephen W. Chipman, as executors, against the American Fork City and others.

Judgment of nonsuit. Plaintiffs appeal.

REVERSED AND REMANDED with directions.

*Edw. McGurrian, W. E. Rydalch, Jacob Evans and C. M. Beck* for appellants.

*J. W. N. Whitecotton, Thurman, Wedgwood & Irvine and Harvey Cluff* for respondents.

STRAUP, C. J.

The plaintiffs were non-suited and appeal. The action is brought to recover damages to real property alleged to have been caused from waters overflowing a ditch or canal along a street in American Fork City. It is grounded on negligence, failing to keep the ditch or canal free from obstructions. The non-suit was granted on the theory that no legal duty was shown on the defendants or either of them to maintain the ditch or to keep it in repair or free from obstructions.

American Fork creek has its source in the mountains about six miles from American Fork City. The creek courses southwesterly through the city and empties into Utah Lake. About

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all the waters of the creek in an early day were appropriated and since used by the defendants. The defendants Pleasant Grove City and Lehi Irrigation Company take their waters from the creek not far from the mouth of the canyon; one carrying its waters easterly and southerly to Pleasant Grove City, the other westerly and southerly to Lehi City, where they are distributed to the inhabitants of the respective cities and to farmers in those vicinities. American Fork takes its waters a considerable distance below the intake of the other defendants and by means of ditches and laterals distributes them to its inhabitants and farmers in that vicinity. Each defendant regulates and controls the waters and the distribution of them in their respective cities, etc., levying and collecting taxes and assessments for such purpose and for maintenance and repair of their respective distributive systems. In about the year 1885 American Fork City, and within the corporate limits of that city, diverted the waters from the natural channel running in a southwesterly direction, and, by means of a ditch or canal, carried them along what is known as Camp street in a more southerly direction to the lake. From thence on the waters of the creek coursed to the lake from such point of diversion in such artificial ditch or channel instead of the natural channel. It is from that artificial ditch or channel that the overflow occurred and spread over and injured plaintiffs' realty. There is evidence to show that that ditch or canal was regulated, controlled, cleaned and repaired by American Fork City in the same manner that it regulated and controlled all other ditches of its distributive system, and defrayed and paid the necessary costs and expenses therefor out of public funds. We think it quite clear that the nonsuit was erroneously granted as to that defendant. It is not so clear as to the other defendants. But there is this: Witnesses speak of such artificial ditch as a waste ditch, and as such was used in common by the three defendants. What they mean, at least some of them, by the term "waste ditch" is a ditch or canal to carry the surplus or unused waters of the creek. The mayor of American Fork City testified that the ditch or canal in question was used and maintained by all three de-

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defendants; that they all assisted in maintaining it and all expended money in cleaning it out. The city marshal and an ex-councilman of the defendant Pleasant Grove City testified that there was a portion of the ditch in question that Pleasant Grove assisted in taking care of; that on occasions of high water there was a "certain stent (stretch) that Pleasant Grove was allotted to and to see that it was repaired for flood waters; that the defendant Lehi Irrigation Company took upon itself the burden to maintain a certain portion and American Fork City a portion; that American Fork City had the north portion, Pleasant Grove City the center, and the other defendant the south portion." There also is evidence to show that each defendant did work with men and teams on the ditch in maintaining, repairing, and cleaning it and defrayed the costs and expenses therefor out of public funds. Some of the witnesses testified that that was done if not year after year, at many different times. One of the witnesses testified that each defendant maintained its "section of the artificial ditch ever since it has been constructed by repairing, keeping it up, keeping the water within bounds, so it wouldn't do any damage."

Counsel for defendants Pleasant Grove City and Lehi Irrigation Company argue that what was done by those defendants were "mere neighborly acts" and "acts of charity and benevolence," and that such acts should not now be turned into acts "of duty and liability." The witnesses seemingly did not so regard such acts, at least not all of them. The mayor of American Fork City did not so regard them. To the contrary, he testified that American Fork City always contended that the other defendants were in duty bound to maintain and take care of their portions of the ditch. The argument is but an inference of fact. As strong an opposing argument can be made that one does not ordinarily, at his own expense, year after year, maintain and repair and clean out a ditch of another on the theory of mere charity or benevolence, especially one municipality on a ditch of another municipality, but, rather on the theory that he has some interest in the ditch or has some duty imposed on him to do so. On the evidence, we think a just inference arises that each of the de-

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fendants had some such interest or duty, and that there is enough evidence to have resisted the motion, and that the court erred in granting it.

The judgment of the court below is therefore reversed, and the case remanded, with directions to reinstate it and to grant a new trial. Costs to the plaintiffs.

FRICK and McCARTY, JJ., concur.

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STATE v. ANSELMO.

No. 2674. Decided May 8, 1915 (148 Pac. 1071).

1. **HOMICIDE—DEFENSES—MENTAL CONDITION.** In a prosecution for homicide, the mental condition of defendant may be considered on questions of deliberation and premeditation, though his incapacity was not such as to relieve him of responsibility. (Page 145.)
2. **CRIMINAL LAW—CONTINUANCE—RIGHT.** The granting of continuance upon the grounds of excitement or bias in the community rest largely in the discretion of the trial court, whose ruling will not be disturbed, unless an abuse appears; and hence a denial of a continuance in a prosecution for the shooting of a police officer, sought on the ground that a subsequent killing had aroused public opinion, will not be reviewed where accused's showing was controverted.<sup>1</sup> (Page 145.)
3. **WITNESSES—TRIAL—CROSS-EXAMINATION.** While courts are loth to restrict cross-examination, it is not improper for the court to refuse to permit counsel to repeat over and over again questions upon subjects which have already been fully developed. (Page 146.)
4. **WITNESSES—TRIAL—QUESTIONS ON CROSS-EXAMINATION.** Counsel, while entitled to considerable latitude in examining witness, should not be allowed to propound and repeat improper and unfair questions. (Page 147.)
5. **CRIMINAL LAW—LEGALITY OF ARREST—QUESTION OF LAW.** Whether an officer was authorized to make an arrest, and the

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<sup>1</sup>*State v. Haworth*, 24 Utah, 398, 68 Pac. 155; *State v. Vacos*, 40 Utah, 169, 120 Pac. 497; *State v. Riley*, 41 Utah, 225, 126 Pac. 294.



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arrest was lawful or unlawful, is a question of law for the court, though the facts are in dispute, in which case the court should charge the jury in specific terms under what state of particular facts the arrest was lawful or otherwise. (Page 148.)

6. **CRIMINAL LAW—LAWFUL ARREST—PRESUMPTION.** Accused and another became engaged in a saloon brawl. Accused's assailant claimed that he was cut in the shoulder, and some time thereafter pointed out accused to an officer, who attempted to take him into custody. In the meantime accused had purchased a revolver, which he then had in his possession. In attempting to escape from the officer, accused killed him. *Held* that, where accused's assailant did not testify at trial, it cannot be inferred, in support of the legality of the arrest, that accused had committed felony in cutting his assailant, or that the officer was arresting him for violating a municipal ordinance by carrying concealed weapons. (Page 148.)
7. **HOMICIDE—MURDER IN THE FIRST DEGREE—DEFENSES.** That accused was illegally arrested will not justify him in taking the life of the arresting officer, unless it reasonably appeared that he was in actual danger of life or limb, other than mere danger from illegal arrest. (Page 151.)
8. **HOMICIDE—TRIAL—INSTRUCTIONS.** Under Comp. Laws 1907, section 4161, declaring that every willful, deliberate, malicious, and premeditated killing is murder in the first degree, it is improper to charge the jury that premeditated means thought of beforehand, for any length of time, however short, and that there need be no appreciable space of time between the intention to kill and the act; the instruction practically not giving any time for premeditation.<sup>2</sup> (Page 153.)
9. **HOMICIDE—APPEAL—HARMLESS ERROR.** In a prosecution for homicide committed by an epileptic, who at the time of the killing was under the influence of liquor, an instruction which practically did not require any premeditation, and might have misled the jury in that respect, is prejudicial, for it is the province of the jury to determine whether accused's mental condition was such as to relieve him of the extreme penalty of his act.<sup>3</sup> (Page 153.)
10. **HOMICIDE—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.** In a prosecution for homicide committed by an epileptic, who was under

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<sup>2</sup>*People v. Callaghan*, 4 Utah, 56, 6 Pac. 49; *State v. Dewey*, 41 Utah, 538, 127 Pac. 276.

<sup>3</sup>*State v. Thorne*, 39 Utah, 208, 117 Pac. 58.

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the influence of liquor at the time of the killing, an instruction, in the words of Comp. Laws 1907, section 4070, declaring that no act committed by a person in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but whenever the actual existence of any particular purpose, motive, or intent is a necessary element the jury may take into consideration the question of intoxication, is not sufficient, but the jury should have been given a concrete instruction applicable to the case at bar. (Page 158.)

11. **HOMICIDE—MOTIVE—EVIDENCE.** Where accused killed an officer in attempting to escape arrest, which was the outgrowth of a saloon brawl, a black jack, revolver, masks, and sneakers, found in accused's room and identified by him, were not admissible on the question of motive, having no bearing on his reason for killing the officer. (Page 159.)
12. **CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER—REBUTTAL.** Evidence of good character or the contrary must be confined to the general reputation of the accused; hence, in a prosecution for homicide, evidence that there was found in accused's room appliances which might be used for crime, although they were susceptible of an innocent use, is inadmissible to rebut accused's evidence of good character.<sup>4</sup> (Page 159.)
13. **CRIMINAL LAW—INSTRUCTIONS—ABSTRACT INSTRUCTION.** The courts should as much as possible, avoid abstract instructions, simply directing the jury in plain terms what the result should be in case they found the facts on any issue as indicated by the court.<sup>5</sup> (Page 164.)

*McCarty, J.*, dissenting in part.

Appeal from District Court, Third District; Hon. *F. C. Loofbourow*, Judge.

Giovanni Anselmo was convicted of murder in the first degree. He appeals.

REVERSED AND REMANDED.

*Thomas Marioneaux* and *W. H. King* for appellant.

*A. R. Barnes*, Atty. Gen., and *E. V. Higgins* and *G. A. Iverson*, Asst. Attys. Gen., for the State.

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<sup>4</sup>*Harrison v. Harker*, 44 Utah, 541, 142 Pac. 716.

<sup>5</sup>*Shepherd v. Railroad Co.*, 41 Utah, 469, 126 Pac. 692.

FRICK, J.

Giovanni (John) Anselmo, the appellant, was convicted in the District Court of Salt Lake County, Utah, of the crime of murder in the first degree, without recommendation, and was sentenced to be executed. He appeals from that judgment.

The state's evidence in chief substantially established the following facts:

At about eight o'clock on the morning of June 25, 1913, the appellant and one Pete Massi, acquaintances, both Italians, were drinking together in what is called the Shamrock Saloon at No. 217 West Second South Street, Salt Lake City. They played cards and quarreled over the game, which quarrel finally culminated in what the witnesses called a scuffle or fight. Massi, it seems, got appellant down on the floor and was standing over him when the bartender interfered, and, using his own language, ordered them to "cut it out"—told them they would not be permitted to quarrel or fight in the saloon. The two young men ceased their quarrel and came into the barroom from the room immediately in the rear thereof where the encounter took place. The appellant laid a silver dollar on the bar, and, addressing both Massi and the bartender, said: "Let's have a drink." They all drank, and Massi pushed back his coat and shirt, and referring to the fight between himself and appellant, said: "I am cut on the shoulder." The bartender says that he saw a small wound on Massi's shoulder and saw a little fresh blood. Massi then wanted to use the saloon telephone to call a police officer, but the bartender refused him the use of it, and the appellant and Massi left the saloon together. Where they went is not shown. The bartender testified that appellant had taken five drinks that morning. The state also proved that at about nine o'clock on the same morning appellant purchased a .32 Smith & Wesson revolver and a box of cartridges from one of our dealers in firearms. The price of the revolver was \$18 and its number was 55578. After they parted, about ten o'clock, or a little after, the appellant went into what is known as the Shamrock Cafe, which is next door to the Shamrock Saloon. He there "jollied" one of the waiter girls, as she called it, by taking hold of her and lifting her up from

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the floor, and after she had "slapped him," as she says, he sat down on a box in a small room between the kitchen and the main dining room in the cafe. The young woman testified that she observed that he had been drinking, and that he appeared pale, and was sitting on the box aforesaid, leaning forward, holding his head in his hands. The foregoing statements are substantially corroborated by another witness, also a waiter girl, who saw the appellant that morning. Both of the girls were acquainted with him. While appellant was sitting on the box, as just stated, Massi and the deceased, a member of the police force of Salt Lake City, dressed in the regulation uniform of a policeman, came into the cafe and went to where appellant was sitting. The officer, after going to appellant, put his hand on appellant's shoulder, and addressing him, said: "What is the matter, boy?" Massi then pulled his coat and shirt aside, and, pointing to and exhibiting what he called a cut on his shoulder to the officer, said: "That is what is the matter." The officer then spoke to appellant and said: "You had better come with me." Appellant replied: "Wait a minute. Let me explain." The officer said: "There will be no explanation. Wait till you get to police headquarters." The officer, appellant, and Massi then left the cafe together, going east along the sidewalk to the first intersection of the street east of the saloon, at which point there was a patrol box. The officer was in the act of going to the box, when appellant broke away from him and ran south along the street running north and south until he reached an open space, where he turned to the west. The officer and Massi, in the order named, followed appellant, and when they had reached a point in the open space aforesaid in the rear of what is called Sweet's Candy Establishment, and the officer was within a few feet of appellant, the latter turned and fired three shots at the officer, all of which lodged in his body. The one causing death passed in at the front and near the top of the forehead, and, passing through the brain, lodged a little back of the ear. This bullet, the doctor testified, caused a fatal wound and produced almost instantaneous death.

There were at least three eyewitnesses to the shooting, and while there are the usual discrepancies in such cases the fore-

going substantially covers the material facts developed by the evidence. The shooting occurred some time between ten and eleven o'clock on the morning aforesaid. We remark that some effort was made by counsel for appellant to show that appellant was threatened with violence by the officer at the time of the shooting, but a careful reading of the evidence in the original bill of exceptions convinces us that there is no evidence whatever upon which the jury could have based such a conclusion. The only inference that is permissible from the whole evidence is that the appellant shot the deceased to avoid being taken to the police station, which the deceased was in the act of doing when appellant broke away from him as before stated.

Appellant made his escape, but was found in a shanty in the rear of his aunt's dwelling between nine and ten o'clock on the night of the day of the shooting. When he was arrested by the police officers, the revolver which he had bought in the morning, together with a duplicate "sale slip," were in his possession, and at the time of the arrest he was apparently again attempting to use the revolver. In making the arrest appellant was wounded by a shot fired by one of the officers. He was taken to the Salt Lake County Jail immediately after his arrest, where he was constantly confined until the time of his trial, in December, 1913.

The evidence produced on behalf of appellant relating to his mental condition is substantially as follows:

At the time of the trial he was twenty-one years of age. He is an Italian by birth, and came to the United States in 1910 with a friend of his father. His father, with an older brother of appellant, lived in Salt Lake City, and had lived there for some years when appellant came to this country. The evidence, without dispute, was to the effect that appellant is what is called an epileptic; that he suffered from epileptic attacks from childhood up to the time that he shot the deceased in 1913; that the attacks had been less frequent and less violent in the later years; that his mother was a daughter of a confirmed drunkard, who died at the age of twenty-eight years from alcoholism, and was also an epileptic and regarded of unsound mind; that appellant's grandmother was an epileptic

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and became insane; that an uncle on the mother's side was also an epileptic, and died before reaching the age of forty years, and only two days after an epileptic attack; that said uncle had two daughters, both of whom were epileptics; that another uncle had four daughters, all of whom were neurotics and epileptics; that the children of those daughters were afflicted with epilepsy and were sickly; that appellant's mother is an epileptic, and, in the town in Italy where she lives, is regarded of unsound mind; that appellant's father as a child was afflicted with epilepsy, and the testimony is to the effect that mentally he is abnormal; that the father's father, appellant's grandfather, died at the age of forty-two years from alcoholism, and for some years before his death was regarded as of unsound mind; that the latter's daughter, one of appellant's aunts, was an epileptic and died insane; that she had but one child, and it was subject to "convulsions," and died at the age of two years; that the father's mother, appellant's grandmother, was an epileptic, and died of senile dementia; that she had two brothers, the son of one of whom was an epileptic, while the other one of the two brothers was a neurotic; that an older brother was afflicted with epilepsy until he was eight years of age, after which time his mind became weak and he has practically become what is termed "silly and idiotic"; that the youngest sister of appellant has been afflicted with epileptic attacks ever since infancy, and is partially paralyzed. The foregoing statements are gleaned from the depositions of doctors, public officials, and business men living in Italy who were acquainted with the Anselmo family and their relatives. There were also other witnesses who lived in Salt Lake City who testified to appellant's epileptic attacks in 1910 and explained his mental condition to the jury. There was also a large volume of testimony from persons living in Italy, as well as from some living in Salt Lake City, to the effect that appellant had always borne a good reputation, and that he was quiet, law-abiding and a peaceable young man. There was also testimony from the landlady of the house in which appellant and his father rented the room in which they lived at the time of the homicide that the appellant was kind and affectionate, that he was quiet, and that

his reputation for peaceableness and quiet was good, and that he had spent his evenings at home. There was also evidence by experts, who testified both for appellant and for the state, explaining fully to the jury the effect of epilepsy on the mind, and how alcoholic stimulants generally affect epileptics.

The appellant also gave his version of the drinking and quarrel with Massi at the saloon, his arrest by the deceased in the morning, of the shooting afterwards, and of his flight and consequent arrest at night. It is not deemed necessary to state further the evidence in that regard, except to state that according to his statement, he had taken six drinks of whiskey before the arrest was attempted by the deceased, and that his system was not in a condition to withstand the effects of alcohol; that he was confused and frightened after his quarrel with Massi.

Three doctors, who had examined the appellant several times after the homicide and before the trial, also testified that he had an enlarged thyroid, that his head was somewhat deformed, and that affections of the thyroid had a tendency to produce various diseases. At least two of the doctors called as experts by the defendant went into great detail respecting the effect a diseased thyroid has on the mind and nervous system. After the doctors had testified fully respecting epilepsy and its effects, counsel for the appellant propounded to Dr. Mayo, one of the experts, a hypothetical question containing fully 6,000 words, in which defendant's diseases, idiosyncrasies, weaknesses, and, in short, his life's history as disclosed from the evidence, was detailed, and the question concluded by asking the doctor "whether or not, in your opinion the defendant, during the period and at the time when the shots were fired, was of sound or unsound mind." The doctor answered: "I think he was of unsound mind." To another doctor was propounded the same, or a similar, question, the concluding part of which was: "Would you expect to find in this defendant a healthy individual mentally, or one weak mentally and subject to epilepsy?" The doctor answered: "I would naturally expect one of weak mentality and weak nervous condition, and from that we could deduce the probability that he might be epileptic." The state also

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called a doctor, who was an expert in nervous and mental diseases, including epilepsy, and he, after considering the facts which the experts for the defendant had considered, and passed their opinions upon, expressed his opinion that the defendant, at the time indicated, was mentally responsible.

I refer to the foregoing only for the purpose of calling attention to the substance of the evidence respecting appellant's mental condition. While the jury found that his condition in that respect was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to affect his mental capacity to coolly de- 1  
liberate and premeditate on his acts. The jury, therefore, as hereinafter suggested, should have been instructed to consider all of the foregoing evidence in determining appellant's mental capacity to deliberate and premeditate the homicide. While one's mental condition may not excuse the act, it may nevertheless affect the degree of guilt.

Massi, it appears, had left for parts unknown, and was not a witness at the trial. In addition to the testimony of the state's experts, already referred to, the state, on rebuttal, proved that during all of the time appellant was in jail, as before stated, he suffered no epileptic attacks, that he seemed normal, and was a model prisoner. The state also produced other evidence on rebuttal, and what is deemed material will be referred to hereafter in connection with the points decided.

Appellant's counsel have assigned 263 errors, all of which are relied on and are argued more or less fully in the twenty-three subdivisions of their brief, and part of which were supplemented by oral argument lasting nearly five hours. We shall, however, discuss only such assignments in this opinion as we deem material in view of the conclusions reached.

The first assignment relates to an alleged error committed by the trial court in refusing to grant appellant's motions for a continuance and change of place of trial. Appellant produced the affidavits of forty- 2  
three residents of Salt Lake County, among whom were lawyers, doctors and business men, who in effect deposed that, owing to the excited state of the public



mind in Salt Lake County then prevailing, which excitement affiants deposed was induced by reason of the fact that only a few days before the case was called for trial one Lopez, a fugitive from justice, had killed three deputy sheriffs and two others while they were attempting to arrest said fugitive for the crime of murder. The affiants, therefore, gave it as their conclusion that the appellant could not then have a fair and impartial hearing in said county. Upon the other hand, there were forty-eight residents of Salt Lake City, among whom were also lawyers, doctors and business men, who deposed that it was their belief that the appellant could and would be given a fair and impartial trial. We have frequently held (*State v. Haworth*, 24 Utah 398, 68 Pac. 155; *State v. Vacos*, 40 Utah 169, 120 Pac. 497; *State v. Riley*, 41 Utah 225, 126 Pac. 294, and cases there cited) that the granting or denying of motions for continuances and for change of place of trial upon the ground of excitement or bias, in the nature of things are, and must be, largely within the discretion of the trial court, and that we cannot interfere with the rulings of that court unless it is made to appear that the court has abused its discretion in that regard. While in view of some of the things that are made to appear in this record it would seem that the public mind must have been affected to a considerable extent, and for that reason we would have felt better satisfied had the court granted a continuance of the case for a reasonable time, yet in view of the whole record we cannot say that the court abused its discretion, and hence this assignment must fail.

It is next urged that the court erred in restricting appellant's counsel in his cross-examination of some of the state's witnesses. There is no merit to this contention. While courts are very loth to restrict cross-examination, and especially so in capital cases, yet there is no reason whatever why the court should not confine the cross-examination within reasonable bounds. The court did not even do that in this case; but merely because the cross-examiner was not permitted to repeat over and over again questions upon subjects which he had already fully developed, he complains of having been unduly restricted. The court, without preju-

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dice to his client's rights, might well have further restricted him in his cross-examination.

It is also insisted that the court committed error in permitting counsel for the state, over the objection of appellant, to propound and repeat improper and unfair questions to appellant's father, who testified as a witness on the 4 former's behalf. Indeed, it is argued that the state's counsel was guilty of gross misconduct in that regard. It could subserve no useful purpose for us to repeat the questions propounded by counsel. It must suffice to say that, while we are not prepared to hold that the conduct of counsel was such as to affect the verdict of the jury, yet we are of the opinion that the propounding of the questions complained of bordered upon, if it did not amount to, misconduct. In the following cases conduct on the part of counsel similar in character to that complained of here is discussed and considered in all of its phases: *State v. Williams*, 65 N. C. 505; *Augusta, etc., Ry. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *State v. Fischer*, 124 Mo. 460, 27 S. W. 1109; *Magoon v. Boston, etc., Ry. Co.*, 67 Vt. 177, 31 Atl. 156; *Schlotter v. State*, 127 Ind. 493, 27 N. E. 149; *People v. Ryan*, 108 Cal. 581, 41 Pac. 451; *People v. Mullings*, 83 Cal. 128, 23 Pac. 229, 17 Am. St. Rep. 223.

We suggest that counsel carefully read the foregoing cases, and as near as possible follow the rule there laid down with respect to their conduct in presenting argument to the jury or in propounding questions during the trial. Counsel in their zeal seldom appreciate the injury that may follow from certain conduct on their part occurring during the heat of a trial, and while their conduct should not be too strictly judged, yet they must not transcend the bounds of propriety, regardless of what they may think of the truthfulness or untruthfulness of statements of witnesses. In view that this judgment must be reversed and the cause remanded for a new trial for other reasons, we have deemed it best to refer to this matter in order to prevent the recurrence of the particular thing complained of, and not that it alone may or did affect the verdict, but had such a tendency.

It is further contended that the trial court erred in its

charge to the jury with regard to when an arrest by a peace officer is legal. Upon that subject the court charged the jury as follows:

"You are instructed that an arrest is made by an actual restraint of the person of the individual arrested, and that an arrest is lawful when made by a member of the police force of any city in either of the following cases: 5, 6 (1) For a public offense, created either by city ordinance or by the statutes of the state, committed or attempted in the presence of the arresting officer; (2) When the person arrested has committed a felony, though not in the presence of the arresting officer; (3) when a felony has been in fact committed, and the arresting officer has reasonable cause for believing the person arrested to have committed it; (4) upon a charge made upon a reasonable cause of the commission of a felony by the party arrested."

In the instruction following the foregoing the jury were advised of the rights of a citizen "if an arrest \* \* \* is unlawful." The jury were also informed of the rights of the officer "if the arrest is lawful." The court then defined what constitutes a felonious assault, and left the jury to determine for itself whether the arrest of appellant by the deceased on the morning of June 25th was "lawful" or "unlawful." To thus permit the jury to speculate upon whether the deceased had legal authority to make the arrest or not constitutes error. The decisions of the courts are practically unanimous that whether an officer was authorized to make an arrest, or whether the arrest was lawful or unlawful, when the facts are not in dispute, is a question of law for the court. Where, however, the facts are in dispute, and while the question on a given state of facts is still one of law, yet the jury must find the facts, and the court charge them in specific terms under what state of particular facts, when found, an arrest is lawful or otherwise. See *Creighton v. Commonwealth*, 83 Ky. 142, 4 Am. St. Rep. 143, and cases cited. It is there said:

"The defense had the undoubted right to show that the deceased, in attempting to arrest him, was acting without any authority; and that being a fact in issue, the court should have determined the

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question and not the jury, as to the right of the deceased to make the arrest."

See, also, *Diers v. Mallon*, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598, and *People v. Kilmington*, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73. Indeed, there is no substantial difference of opinion among the authorities upon this question. From the facts, as we have stated them, therefore, nothing is made to appear that appellant had in fact committed a felony, and it certainly does not appear that he committed either a felony or a misdemeanor in the presence of the deceased, or that he had been charged by any one of having committed a felony, as was the case in *People v. Kilmington*, *supra*, and in *Carson v. Dessau*, 142 N. Y. 445, 37 N. E. 493. It must be remembered that Massi, the only person who seems to have known just what act or acts appellant had committed before the deceased attempted to arrest the appellant, did not testify in the case, and hence what, if anything, he may have known or may have communicated to the deceased relative to appellant's acts or conduct preceding the arrest is not disclosed. It is conceded by counsel for the state that the evidence respecting the right of the deceased to arrest the appellant under our statute is purely inferential. Upon that subject all that is claimed is stated in the state's brief in the following words:

"It is true there was no affirmative proof that the fact of a quarrel between Massi and the defendant, or that during such quarrel the defendant had used a deadly weapon upon Massi, had been communicated to the officer, nor that a request had been made by Massi to the officer that he (the officer) arrest the defendant because of the fact that the defendant had, during such quarrel, used a deadly weapon upon him which he had concealed about his person, nor that the presence of the officer was for the purpose of arresting the defendant because of a violation of the city ordinance with reference to carrying concealed weapons, or because of the fact that an assault with a deadly weapon had been made upon Massi. Proof of these affirmative facts was unnecessary. The jury would have the right to infer such facts from the evidence introduced regarding the circumstances of the quar-

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rel, the use of the razor by the defendant during such quarrel, the fact that Massi at the termination of the quarrel had attempted to use the telephone at the saloon for the purpose of calling an officer, the fact that immediately after the quarrel he left the saloon, and that a short time thereafter he returned in company with an officer—an officer having no personal acquaintance with the defendant, and who, upon approaching the defendant in the room, addressed him and made inquiry regarding the nature of the trouble. All these facts lead to the reasonable conclusion that the officer had been informed by Massi of what had occurred, and had been requested to arrest the defendant, both because of the fact of the assault upon him with a deadly weapon, and because of the further fact that the defendant then had such a deadly weapon concealed about his person. Such conclusions might properly be made by the jury from the facts then in evidence. It was within the right of the state to show the facts in the case, one of which was the ordinance in question. It was the province of the jury from these facts, together with any reasonable inference to be drawn therefrom, to conclude whether a public offense had been committed in the presence of the officer, or whether such officer had reasonable cause before making the arrest of the defendant to believe that he had committed a crime, or whether both of these conditions existed.”

It is not deemed necessary, and I shall not attempt to enlarge upon the reasons why counsel's claims are entirely too sweeping, except to say that the jury had no right to assume or infer what particular thing or fact Massi communicated to the deceased respecting appellant's conduct. If such an assumption can prevail, then it never would be necessary to prove authority, since it could always be inferred that the officer must have been informed that a felony had been committed and that the accused in all probability committed it. There was no evidence to show that appellant had in fact committed a felony, nor that the deceased had reasonable cause to believe that appellant had committed it, if in fact he had committed one. All this was left to conjecture pure and simple. The state, therefore, utterly failed to prove any

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fact or facts from which the court could say, or the jury could have found under proper instructions, that the deceased was authorized to arrest the appellant. The case, therefore, is one of failure of proof upon that subject, and hence the court should have charged the jury that here was no evidence respecting the officer's right or authority to arrest the appellant. The case must therefore be treated as though the deceased had committed a technical trespass in attempting to arrest appellant. Nor does the city ordinance prohibiting the carrying of concealed weapons, introduced in evidence, help the matter. Nothing is shown that the deceased attempted to arrest the appellant for carrying concealed weapons, or that the deceased even knew or had cause to suspect that appellant had a revolver in his possession. Indeed, it would seem that the deceased neither knew nor suspected such to be the fact, else he would have taken the revolver from appellant before attempting to take him to the police station.

In case a homicide has been committed, then in making, or in attempting to make, an arrest, the question of the authority of the officer or person making, or attempting, the particular arrest is always important upon the 7 question of the degree of guilt of the accused. Where, therefore, an officer is killed in making an arrest, who it is claimed was without authority to make it, the jury, from all the facts and circumstances disclosed by the evidence, must determine whether, by reason of the making, or attempting to make, the arrest in the manner and under the circumstances it was made, or attempted, the killing constituted murder in any of its degrees, or merely constituted manslaughter, or whether it was justified in law. In the case at bar I think the question of appellant's right to resist the arrest in question was properly and fairly submitted to the jury by the trial court. Although an officer or other person may make, or attempt to make, an arrest without legal authority so to do, yet the person arrested may not, for that reason alone, kill the person or officer making or attempting to make an illegal arrest. Such a homicide may still be murder in the first degree, if the facts and circumstances under which it occurred bring it within the statutory definition of first degree murder. It

certainly is not the law—and we trust never will be in this jurisdiction—that a citizen may kill an officer with impunity merely because such officer may make an attempt to arrest the citizen without legal authority so to do. True, the right of the citizen to enjoy liberty at all times is sacred, and may not be interfered with without legal right or authority by any one. Yet, upon the other hand, the citizen may not ruthlessly take the life of any one who may interfere or attempt to interfere with that liberty. Where an unlawful arrest is attempted by an officer or another, the person sought to be thus unlawfully arrested may no doubt resist such an arrest with all proper and reasonable means. He may, however, not kill the offending officer or person, unless it reasonably appears to such citizen that his life or limb is in danger. In other words, life may not be sacrificed in such cases, unless it is done pursuant to the right of self-defense, the same as in other cases of personal trespass. 1 Bishop, Cr. L., Section 868; *State v. Byrd*, 72 S. C. 104, 51 S. E. 542; *State v. Meyers*, 57 Or. 50, 110 Pac. 407, 33 L. R. A. (N. S.) 143; *People v. Price*, 9 Cal. App. 219, 98 Pac. 547; *Roberson v. State*, 43 Fla. 156, 29 South. 535, 52 L. R. A. 751; *Creighton v. Commonwealth*, *supra*; *Williams v. State*, 44 Ala. 41. The Supreme Court of Alabama, in stating the respective rights of the citizen and the officer where an illegal attempt to arrest such citizen is made, in the last case cited, says:

"The citizen may resist an attempt to arrest him, which is simply illegal, to a limited extent, not involving any serious injury to the officer. He may oppose a felonious aggression upon him in the execution of a lawful arrest, even to slaying the officer, when it cannot otherwise be prevented. But where he has no reasonable cause to apprehend any worse treatment than a legal arrest should subject him to, it is his duty to submit and seek redress from the law."

In the case of *State v. Meyers*, *supra*, the Supreme Court of Oregon states the rule thus:

"Where the arrest is made by a known officer, and nothing is to be reasonably apprehended beyond a mere temporary detention in jail, resistance cannot be carried to the extent of taking life."

As we have pointed out, there is nothing shown in this case

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from which the jury would have been justified in finding that appellant had any reasonable cause to believe that the deceased in any way threatened his life or physical safety in making the arrest in the cafe, and whether he had any reasonable cause to believe or apprehend any bodily harm, great or otherwise, at the hands of the officer or Massi when the rearrest was attempted, as we shall see hereafter, was fully and properly submitted to the jury. The appellant had a clear remedy if his arrest was in fact illegal, and he should have pursued that rather than the one selected by him.

The question, therefore, is: Was the case properly submitted to the jury upon the facts? This brings us to the assignment that the court committed error in its 8, 9 charge to the jury. The court, in submitting the question of first degree murder to the jury, gave the following charge:

"Premeditated means thought of beforehand, for any length of time, however short. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as the successive thoughts of the mind. It means a specific intention to take human life, thought of beforehand. If there is such design, or determination to kill, deliberately formed in the mind at any moment before the fatal act is done, it is sufficient."

This is all the information the court gave the jury respecting premeditation. The court did, however, as we think, correctly define deliberation. Our statute (Comp. Laws 1907, Section 4161), so far as material here, provides:

"Every \* \* \* willful, deliberate, malicious, and premeditated killing, \* \* \* or (any killing) perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life—is murder in the first degree."

Under our statute, therefore, it is not sufficient that the killing of a human being be intentional and deliberate, but to constitute murder in the first degree, in addition to the foregoing, the killing must be premeditated. The charge of the court that an act can be premeditated within a space of time so brief that the human mind cannot appreciate it—



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that is, cannot grasp it—seems confusing, to say the least. It is true that quite a number of courts have approved such expressions in instructions in particular cases under statutes similar to ours. See 3 Thompson on Trials (2d Ed.), Sections 5437 to 5446, inclusive, where instructions approved by various courts are given. Such expressions are also found in the instructions given in the following cases: *State v. Pro-low*, 98 Minn. 459, 108 N. W. 873; *Müller v. State*, 54 Ala. 155; *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *State v. McDaniel*, 94 Mo. 301, 7 S. W. 634; *Koerner v. State*, 98 Ind. 8; *Perugi v. State*, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865; *Binns v. State*, 66 Ind. 428; *People v. Callaghan*, 4 Utah 56, 6 Pac. 49. The Minnesota statute, however, differs from ours. In *Binns v. State*, *supra*, the accused had been convicted of first degree murder four different times, and it was manifest that the jury could not possibly have been misled or affected by the charge given. The charge here in question has, however, also been given in at least one other case which came before this court, namely, in the case of *State v. Dewey*, 41 Utah 538, 127 Pac. 275. No objection was, however, made to the charge in such particular, nor was the point in any manner presented or called to the attention of the court in that case. The judgment was reversed on other grounds. In the case of *People v. Callaghan*, *supra*, the accused was convicted of second degree murder only, and the court, in passing upon such an expression in the charge said:

"In this case, the appellant was acquitted of murder in the first degree, and, as applied to murder in the second degree, the offense of which he was convicted, the instruction was correct."

It is true that the justice, in writing the opinion in that case, in other portions of his opinion seems to approve such an expression; but it requires no argument to show that what he said otherwise, in view of the conclusion reached in that case, could have no bearing upon the real question before us. While we cannot pause to review all of the cases in which such expressions have both expressly and impliedly been approved by appellate courts, yet we do not hesitate to say that a careful reading of those cases will, in almost every

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instance, convince the reader that the cases were correctly decided, and that by reason of the facts and circumstances involved in them the jury could not have been affected, much less misled, by the expressions used by the trial courts in their charges. Moreover, the definition of premeditation in almost every one of those cases is such that, notwithstanding the expression that "no appreciable time is necessary," it is nevertheless clearly made to appear from what is said that by the expression "no appreciable time" was in fact meant that no fixed or definite time for premeditation was necessary. That no fixed or definite time is necessary or can be stated to the jury is manifestly sound, and is supported by practically all the courts.

In the following cases, however, such expressions are criticised and disapproved: *Ross v. State*, 8 Wyo. 384, 57 Pac. 931; *State v. Rutten*, 13 Wash. 203, 43 Pac. 30; *State v. Moody*, 18 Wash. 165, 51 Pac. 356; *State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38; *State v. Hockett*, 70 Iowa 442, 30 N. W. 742. In 1 Wharton's Cr. Law (11th Ed.), Section 219, speaking of the deliberation and premeditation necessary to constitute murder in the first degree under a statute like ours, the author says:

"Deliberation and premeditation being established, the length of time it existed is immaterial; the homicide will be murder. Design long enough for reflection preceding the killing, and being of sufficient duration for the formation of a definite purpose to kill, may constitute a 'deliberate and premeditated design to kill.' A fixed design to kill makes the homicide murder in the first degree; a *design to kill formed on the spur of the moment* makes the homicide murder in the second degree." (Italics ours.)

To the same effect is *People v. Chiaro*, 200 N. Y. 318, 93 N. E. 931. In *People v. Majone*, 91 N. Y. 212, Mr. Justice Earl states the law under a statute like ours thus:

"Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is.

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The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case."

In our judgment the correct doctrine is contained in the foregoing quotation. No attempt should be made to fix any definite space of time which is necessary to constitute the premeditation required by our statute. Why, then, confuse the jurors, who are laymen, with statements which must be utterly incomprehensible to them? Why tell them that an act, which constitutes the most heinous crime known to the law, and which involves the most momentous consequences to both the slayer and his victim, can be conceived and premeditated (reflected upon) within a space of time so brief that the human mind can neither appreciate nor grasp its duration? And why, after telling them that, attempt to explain it away by again telling them that the statement does not mean just what the words imply? Why not inform the jurors in plain and explicit terms just what the law requires? Why not tell them that, while it is not necessary that there be any definite or fixed period of time for premeditation or reflection, and that no fixed or definite time can be stated, yet that some space of time, however brief, for premeditation, is necessary before the fatal shot is fired or the fatal blow is struck, and that if they find that there was a fixed design or purpose in the mind of the accused to kill for any space of time, however, brief, before he committed the fatal act, and that he committed the same pursuant to such design or purpose, then the killing would constitute murder in the first degree? The jury should also be informed in that connection that in determining the question of such design and premeditation they should take into consideration all the facts and circumstances developed at the trial, as well as the evidence relating to the mental condition, including that of intoxication of the accused, where such evidence has been introduced and is proper to be considered by the jury, as hereinafter stated.

Moreover, as has been frequently suggested, some men think and act more quickly than others. Again, the same man may think and act differently under different circumstances, and

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when the mind is or recently has been afflicted with disease, drugs or intoxicants it may act more sluggishly. All these things may, and usually do, have more or less influence upon men's actions. While, therefore, we are not prepared to say that we should, under all circumstances, reverse a judgment because the court has charged the jury with regard to premeditation, as was done in this case, yet we do hold that under the evidence in this case relating to appellant's physical ailments and the effect such ailments may have had on his mental condition the charge, in the form it was given, may have influenced, and in all probability did influence, the jury either to find the defendant guilty of murder in the first degree, or at least in inducing them to withhold the statutory recommendation. While it is true that the jurors were not required to believe the evidence with regard to appellant's mental condition, yet it is also true that they may have concluded that no appreciable time—that is, no time whatever—for premeditation was necessary, regardless of what that mental condition may have been, so long as they found that appellant was not insane to the extent of being morally irresponsible for his acts. That, as a matter of course, is not the law. A person's mental condition may not be such as to make him irresponsible for his acts, and yet it may be such as to relieve him from the extreme penalty imposed by law for the committed act. This is the theory upon which our statute giving the jury the right of recommendation is based, and, as we held in *State v. Thorne*, 39 Utah, 208, 117 Pac. 58, one accused of and tried for murder in the first degree is always entitled to the uninfluenced judgment of a fair and impartial jury upon that question. If, therefore, a person who is both mentally and physically sound is entitled to the judgment of a jury whose minds are uninfluenced from any source, how much more important is it that one whose physical ailments and mental condition incident thereto are by competent evidence shown to be abnormal, to say the least, should be tried by a jury upon such instructions as leave no reasonable room for doubt with regard to what the charge really means upon a subject so important as the one just discussed? Under the particular circumstances of this case, as

disclosed by the evidence, therefore, we think the giving of that portion of the charge we have set forth herein constituted reversible error.

The next assignment is closely related to, and must be considered in connection with, the one just discussed, for the reason that it relates to appellant's mental condition at the time the shooting occurred. As pointed out, ap- 10  
pellant's contention is that at the time the shooting occurred, he was intoxicated, and, in view of his physical ailments, alcoholic liquors had a peculiar effect upon his mind. The court charged the jury as follows:

"You are instructed that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition; but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to commit any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

That instruction, after the first four words, is an exact copy of Comp. Laws 1907, Section 4070, and thus states the law of this state upon the subject of intoxication. As an abstract statement of the law it is therefore correct. Appellant's counsel, however, contend that the instruction in its present form was no guide or aid to the jury, and hence the case was, in effect, submitted to them as though no instruction had been given upon the subject of intoxication. Counsel further contend that they offered a proper request upon the subject, and that the court erred in refusing to charge as requested. We are of the opinion that, in view of the evidence of appellant's mental condition, including that relating to his intoxication, and especially in view that the court's attention was directly called to the question by appellant's request to charge, it, in substance at least, should have charged the jury as requested; that is, the court, in effect, should have charged the jury that, while voluntary intoxication was neither an excuse nor a defense, yet, if the jury found that appellant was intoxicated to such an extent that he was mentally incapable of

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deliberating or premeditating, and to entertain malice aforethought, and to form a specific intent to take the life of the deceased, in such event the jury should not find him guilty of murder in the first degree. In this case such a charge was very important, in view of the whole evidence relating to appellant's affliction, which, if the evidence is true, did necessarily more or less affect his mind. And of course the court could not assume, in charging the jury, that the evidence upon that or any other subject was either true or false. Merely to charge the jury in the language of the statute was not sufficient in this case, and it may well be doubted whether it is sufficient in any case where a charge with regard to intoxication is proper. As directly bearing upon this point, see 17 A. & E. Ency. Law (2d Ed.), 408, 409; 21 Cyc. 1047; *Cook v. State*, 46 Fla. 20, 35 South. 665; *People v. Leonard*, 143 N. Y. 360, 38 N. E. 372; *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066. In the cases cited this precise question is considered, and instructions like the one in this case are criticised. It is further held in those cases that in cases where, as here, the crime is divided into degrees, and where deliberation and premeditation are necessary elements, the jury should be properly instructed with respect to the effect of intoxication. The jury should thus be told in plain terms that while voluntary intoxication cannot be considered, either as a defense or an excuse for the act charged, yet if they find that the intoxication was to the degree and to the extent hereinbefore stated, such fact would be important in determining the degree, where the crime is divided into degrees. They should also be told that, if they find the intoxication did not affect the mind of the accused to the extent stated, then not to consider the same. The law in this regard is humane, and seeks to temper the penalty or punishment to the moral responsibility involved in the act.

Some time after the homicide the room occupied by the appellant and his father was searched. There was found therein a revolver, a black jack, two masks, and a pair of shoes called sneakers. These, when appellant was on the 11, 12 stand, were exhibited to him on his cross-examination. He said that the revolver belonged to his father, that the

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black jack was left with appellant the week preceding the shooting by a certain Lugi Garza, a friend, who worked in Ogden, and that the shoes called sneakers he had purchased three or four days before the shooting from a certain dealer in Salt Lake City, who also testified to the purchase. Appellant further testified that he knew nothing concerning the masks. The reason why he bought the shoes he fully explained, and that in all probability he knew nothing about the masks was fully explained by another disinterested witness. Thereupon the state, over his objection, was permitted to introduce all of those articles in evidence; and it is insisted in the state's brief, and was an oral argument contended by the state's counsel, that inasmuch as appellant had voluntarily identified those articles and had explained the ownership thereof, no error was committed in admitting them in evidence. It is further contended that all of them were material and competent evidence upon the question of motive and in meeting appellant's evidence relating to his good character. We think they were improperly received in evidence. Clearly, under the circumstances disclosed by the evidence, those articles could shed no light upon appellant's motive in doing the shooting. A mere statement of the proposition, in the light of the evidence, it would seem, is sufficient answer to such a contention. How could the possession of such articles bear any relation to the motive which actuated appellant in shooting the deceased, who was a total stranger to appellant when he last saw the articles, if he ever saw all of them? He thus could not have obtained or possessed any one of the articles because he entertained any ill will against the deceased. Indeed, the proposition that the ownership or possession of those articles could not have had any possible relation to appellant's motive in shooting the deceased is so palpable that it admits of no discussion. Nor is the contention sound that the articles were admissible to meet and refute appellant's evidence relative to his good character. The only effect that the admission of those articles in evidence before the jury could have had was to convince them that appellant must be a bad man, or he would not have had them in the room he was occupying with his father. Nor does it

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require argument to condemn such procedure in our jurisprudence. If any one contended for the proposition that, in order to show that one accused of a particular crime was probably guilty of some other offense, or to establish his guilt it was proper to show that he was a bad man generally, or that he had the inclination to commit or the means of committing other offenses, his contention would fall on deaf ears. In principle wherein does the contention here made differ from the supposed one? It is settled law that evidence of good character, or evidence to the contrary, must be confined to the general reputation of the person, or to the general reputation of the particular trait of character in issue. That question was settled in this jurisdiction in the case of *Harrison v. Harker*, 44 Utah, 541, 142 Pac. 716. The rule is there stated in the headnote in the following words:

"Where the character of a party is in issue, it is only the general reputation that may be assailed, which cannot be done by proof of particular acts of wrongdoing."

If particular acts of actual wrongdoing may not be shown, how can the fact that a person possesses the means or the inclination to commit wrongs be shown? In the following cases the question as to what is proper evidence respecting good character is thoroughly considered, and in all of them the rule as quoted from *Harrison v. Harker, supra*, is not only upheld, but it is strictly enforced; *State v. Sterrett*, 71 Iowa 386, 32 N. W. 387, approving and following *Gordon v. State*, 3 Iowa 410; *People v. Bishop*, 81 Cal. 113, 22 Pac. 477; *Bayse v. State*, 45 Neb. 261, 63 N. W. 818; *Nelson v. State*, 32 Fla. 244, 13 South. 361; *Cook v. State*, 46 Fla. 20, 35 South. 665; *McKelvey on Ev.* (2d Ed.), 123. The only difference among the courts goes to the extent that the witness who testifies to the good character of the accused and the accused himself may be cross-examined. In Iowa and California cross-examination is very much restricted in that regard, while in most other jurisdictions a more liberal cross-examination is permitted. But the articles are inadmissible for other reasons which are clearly stated by the Supreme Court of California



in the case of *People v. Lee Dick Lung*, 129 Cal. 491, 62 Pac. 71. That court makes it quite clear that such articles under the circumstances of the case at bar are not admissible for any purpose.

None of the cases relied on by the state are in point upon the proposition involved here. Neither do the recent cases emanating from this court (*State v. Riley, supra*, and other cases), in which the admission in evidence of certain articles found in the possession of the accused was sustained, have any bearing upon this question. The question, when stripped of all extraneous claims, simply amounts to this: May articles such as disclosed under the circumstances of this record be put in evidence to show criminal propensities, or motive, or bad character? Such a procedure would hardly be tolerated even in continental Europe, and it certainly finds no support in English or American jurisprudence. Moreover, the articles found are not necessarily the implements or instrumentalities of a confirmed criminal. Certainly many men have revolvers in their homes, and no one would think of accusing them of being bad men for that reason. Again, masks may be found in some homes, especially among young people; but, so far as we know, they are not so clearly the indicia of crime that they can be received in evidence as proof of that fact. Again, many different kinds of shoes may be and are no doubt used by different people. No doubt some good men wear garments similar to those worn by the criminally inclined, but to do so is no crime, nor is it necessarily evidence of a criminal propensity. A black jack no doubt is a dangerous implement in the hands of a criminal, and is perhaps generally used by criminals. But merely to find such an implement in the home of an individual after a homicide has been committed by him is no evidence whatever that he had murder in his heart when he committed the same.

While the homicide committed by the appellant seems quite unjustifiable, and while perhaps he deserves severe punishment, yet no one should, and we hope in this jurisdiction none will, ever suffer the extreme penalty of forfeiting his life until he has been legally convicted. In the eyes of the law

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no one, however humble, is deemed guilty until he is found so in conformity to law.

The matters hereinbefore considered are not technical, but are substantial. They all directly affect the legal rights of every one. Under our jurisprudence men may be tried only for the specific crime with which they stand charged. All other crimes, with well known exceptions, which the accused may have committed or contemplated, are irrelevant, and may not be shown against him. If other actual offenses may not be shown, then it must follow that facts and circumstances from which some might deduce an inference that those who have offended might possibly be induced to commit more offenses can likewise not be shown. The court committed manifest error in admitting in evidence the articles referred to.

It is further insisted that the court erred in its charge respecting the effect that the jury should give to the evidence of good character. While the charge is not a model, yet we do not think the appellant was prejudiced in any substantial right by what the court said or omitted to say in that regard. We remark, however, that the question of the sufficiency of such a charge and the effect that the jury may give such evidence is so fully stated in *State v. Brown*, 39 Utah 140, 115 Pac. 994, Ann. Cas. 1913E, 1, that it seems wholly unnecessary to discuss this subject further.

Since writing the foregoing, one of my Associates, in a separate opinion, has expressed much doubt whether what I have said upon the question of premeditation states the law, and whether it will not confuse, rather than aid, the trial courts in charging the jury upon that subject. The mere suggestion shows that the writer of that opinion regards the question of time as one of law rather than one of fact. The vice of such a charge consists in attempting to fix or limit the time which is deemed necessary for reflection or deliberation, or which is sufficient for that purpose. I repeat here, what I have already in effect said, that the courts should not attempt to fix or prescribe any time, but should submit the question of whether the killing in question was committed with premeditation and deliberation to the jury, and if they, under all the facts and circumstances relating to the killing,

including the evidence respecting the mental condition of the accused at the time if there be such, find beyond a reasonable doubt that the killing was in fact premeditated by the accused, then the statute defining that element has been met, and that question should be found against the accused. Is it not easier to submit a proposition without a specific limitation as to time than it is to attempt a limitation in that regard, and especially where the law fixes and can prescribe no limitation?

While we are upon this subject it might not be out of place to again refer to what we have several times before referred to, namely, that in charging the jury the trial courts should avoid as much as possible the statement of mere 13 abstract rules or principles of law. See the recent case of *Smith v. Cannady*, 45 Utah 521, 147 Pac. 210. Jurors are all laymen, and possess no knowledge of legal rules or principles. To merely inform them with regard to the abstract propositions of law, however correct such a statement may be, nevertheless affords them no guide as to how to arrive at a correct conclusion. As a rule jurors possess the requisite intelligence and knowledge to arrive at a correct conclusion with regard to the facts, but in most instances they are entirely unable to apply the law to the facts after they have found them. Whenever such a course is possible, the jury should be told in direct terms that, if they find the facts upon a certain issue or question to be a certain way, the law requires the result to be a certain way, stating what it should be. Whenever the facts are found, the law determines the result, and the theory of our procedure is that the jury shall be untrammelled in determining the ultimate facts, while the courts must direct the result required by the law when the ultimate facts are found or are conceded. Why, then, attempt to direct the jury in arriving at the correct result by merely stating to them abstract principles of law, which the court has determined in its own mind are applicable to the issues in case the ultimate facts are found to be either one way or the opposite? Is it not far better to tell the jury that, if they find the ultimate facts respecting the issue or the question involved to be one way, then the law requires that the result—that is, their verdict or conclusion upon that issue or

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question—must be a certain way, stating in terms what it should be? The jury thus always finds the facts, while the court in direct terms informs them what the law, upon those facts, requires, and further tells them what the result should be, which, if it covers the whole case, constitutes their verdict. While it is true that by following the abstract method of charging the jury they may, and no doubt often do, arrive at a correct result, yet they also often in effect apply their own conception of the law to the facts, and thus do not arrive at the result the law requires, although the party against whom the issues are declared may not be able, for reasons known to every lawyer, to have the result reversed or modified on appeal.

The case at bar affords a striking illustration of how a mere statement of abstract rules of principles may be useless to a jury of laymen. Referring again to the instruction upon intoxication as given in this case, it is at once apparent to the lawyer that a jury of laymen may read such a charge over and over again and yet receive no light whatever how to apply it to the facts which were produced before them upon that subject. If the jury, however, were told that if, from all the evidence upon that subject, they found that the accused was intoxicated to the extent that he was mentally incapable of deliberating and premeditating the killing, he in such event could not, under our law, be guilty of the crime of murder in the first degree, and they should so find, but if, upon the other hand, they found beyond a reasonable doubt that, although he was intoxicated, yet that such intoxication did not affect his mental capacity to deliberate and premeditate, or that he had sufficient mental capacity to premeditate and deliberate, and that he did in fact deliberate and premeditate the killing in question, then, if they found all the other essential elements constituting the charge against the accused beyond a reasonable doubt, he would be guilty of murder in the first degree, and they should so find, the jury could not possibly go astray. Of course, in criminal cases the court must define all technical words and phrases, which is usually done, and in addition to that the court usually also tells the jury just what the material elements constituting the charge are. After doing so, the court could dispose of most questions by

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simply directing the jury in plain terms what the result should be in case they find the facts upon any issue or question as indicated by the court. The principle now under consideration is discussed at some length in *Shepard v. Railroad Co.*, 41 Utah, 469, 126 Pac. 692.

After a careful consideration of all the other numerous assignments, we find nothing worthy of further discussion.

For the reasons stated, the judgment is reversed, and the cause remanded to the district court of Salt Lake County, with directions to grant the appellant a new trial.

STRAUP, C. J.

I concur. I, too, think the attempted arrest of the defendant by the deceased was unlawful. It is not claimed that any breach or violation was committed in the presence of the officer. The attempted arrest admittedly was without a charge, or warrant, or process of any kind, or without even informing the defendant for what he was being arrested. It is claimed that the defendant had committed a felony—made an unlawful assault in the saloon on Massi with a deadly weapon, a razor—and for that reason the officer was justified in arresting him without a charge, or warrant, or process. The court, in the language of the statute (Comp. Laws 1907, Section 4637), charged the circumstances under which a lawful arrest for a felony committed, not in the presence of the arresting officer, may be made without a warrant, and that such an arrest is lawful “when the person arrested has committed a felony,” or “when a felony has in fact been committed and he (the officer) has reasonable cause for believing the person arrested to have committed it.” Under such a statute, to constitute a lawful arrest in the daytime, without a warrant, for an offense not committed in the presence of the officer, it is enough that the officer had reasonable cause to believe the person arrested had committed a felony, but it must appear that “a felony has in fact been committed,” and that the person arrested committed it, or that the officer had reasonable cause to believe he had committed. That is the statute. That must control us, no matter what may be the rule elsewhere, or what it may have been at common law.

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Thus must we look to the evidence to ascertain what, if any, felony had been committed. As to that but two witnesses testified, the defendant in his own behalf, and one Fina, a bartender, in behalf of the State. As testified to by the defendant, he in the morning, between eight and nine o'clock, met Massi near or at a saloon. They drank and played cards. The defendant accused Massi of cheating. A dispute and a quarrel arose. The defendant "was sick and half drunk." Massi was much larger and stronger than he was. He further testified that, in the quarrel, Massi pushed him about, and—"after he pushed me hard I fell down, and he came on top of me. Then he started to hit me with his hand. After that he took an empty bottle. He held me with one hand. I was between a few barrels or cases of beer, and when I saw him try to hit me with the bottle I put my hand in my pocket to pick out the razor, but it fell down on the floor, and after a half minute I got the razor and opened it. I noticed that it cut my hand a little. I used it in my defense, but I don't know whether it cut Pete (Massi) or not. He had his knees at that time on top of my breast, and in one hand he had the bottle, and with the other he held my left hand. I also noticed he had a gun in his side pocket, and I believed from what he was doing that I was in danger of great bodily harm, or of my life. At that time Camile Brunzo came in, and they (Brunzo and Fina) separated us. I do not know what became of the razor. Pete Massi then started calling me bad names. Charlie Fina said, 'Make up, boys, and shake hands.' I tried to shake hands with Massi, but he would not shake hands with me. I remember we drank after that. When he refused to shake hands, he said: 'No, I won't shake hands. I am going to kill you. Remember this is the last day of your life. I want to meet you somewhere this evening.' "

He further testified to Massi's calling him vile names, making threats that he would be looking for him that evening and would kill him. The defendant, with Brunzo, then left the saloon. Massi also left the saloon.

Fina, the state's witness, testified that the defendant and Massi were in the front of the saloon playing cards and quarreled over the game, and that there was a sort of partition

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between the rear of the saloon and the bar. He further testified:

"The first thing I noticed they were scuffling, and then they passed beyond the partition in to the back room. The next I saw, Johnnie (the defendant) was on the floor and Pete Massi over him. I would not say that Pete did not have a bottle or an ax in his hand. I could only see the part that faced me. I could not see anything in his hands. It was several seconds after they passed behind the partition before I got to the end of the bar to see them, and what was being done in there during that period I don't know. Whether Massi had knocked the defendant down with a bottle or something else I could not say, but when I saw them Massi had Johnnie down, holding him, and I made him get off; that is, I asked him to, and said there would be no fighting done here. I don't know whether Brunzo came in at that moment or not. If he was there, I didn't see him; but lots of people come in that I don't notice. • • • I could see Massi's back when I got to the end of the bar, and Massi was stooping over the defendant in a position of this (indicating) kind. Massi was holding defendant down. Did not see any blows struck. When I observed Massi, his hands were not moving. When I got to the end of the bar, I told them to 'cut that out,' and that if they were going to quarrel they could go outside. They got up and came in front of the bar, and the defendant called Massi and said, 'Let's have a drink,' and laid down a silver dollar, and invited me to drink. We all drank. Massi said, 'I am cut on the shoulder.' He took back his shirt, and there was a little bit of a wound, merely brought blood. It mad him mad, and he wanted to use my telephone. I told him he could not use the telephone to call officers. After the drink they went out."

Now, I do not think that shows that the defendant made an unlawful assault on Massi. It shows that whatever he did was done with cause and justifiably. To hold otherwise is to say that the defendant, a weakling and an epileptic, in a half-drunken condition, and on the floor with Massi on top of or over him in a threatening attitude, was required to submit to whatever chastisement or punishment Massi saw fit to administer to him. That Massi may have received a slight cut

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on the shoulder from the razor in the hands of the defendant is not the determinative factor. The controlling thing is the circumstances under which the cut was received. They show, substantially without dispute, that what the defendant did was not unlawful or felonious, but justifiable. I therefore see nothing to show that the defendant had committed a felony.

After that trouble the defendant went to a nearby restaurant. He remained there but a short time, and then went up town and purchased a gun, he says, to protect himself because of the threats made by Massi. In about an hour and a half he returned to the restaurant and seated himself on a box in a back room. He had been there about 15 minutes, "doing nothing and not saying anything to any one," when Massi "put his head into the room," saw the defendant, and then departed. In a few minutes he returned with the deceased, a police officer. No attempt was made to arrest the defendant for having a weapon. So far as made to appear, neither the officer nor Massi knew that the defendant had a gun. Neither was any attempt made to arrest the defendant for drunkenness. What took place when the officer and Massi came to the restaurant is told by the State's witnesses. The officer, walking towards the defendant, asked him, "What is the trouble?" The defendant replied, "There is no trouble." At that Massi threw his coat back and said, "This is the trouble," exhibiting, as one of the witnesses called it, "a scratch or something on the shoulder;" another, a tear in the shirt. The officer then walked up to the defendant, "grabbed him by the shoulder," and commanded him to go with him. The defendant said, "Let me explain." The officer said, "You can't explain; there will be no explanation here." The officer then "marched the defendant in front of him, and had hold of him, and went out of the building and up the sidewalk," Massi following. When they reached "an alarm box," and as the officer was about to turn in an alarm, the defendant ran away. The officer and Massi pursued him but a short distance when the officer, who had overtaken him, and was about to re-seize and recapture him, was shot by the defendant. One witness for the state testified that as the officer overtook the defendant he called out "Hands up!" and raised his club in a



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striking attitude, and that the defendant then shot. Other witnesses, seeing the defendant run and pursued by the officer and Massi, testified they did not see a club raised, but testified that for a time the defendant and the officer were not in view, but that they saw them when the last shot was fired, and saw the officer stagger and fall. It is not made to appear that the officer undertook to draw his gun, or threatened to shoot the defendant. The most that can be claimed is that he, in the attempt to reseize and retake the defendant, commanded him to throw up his hands, and raised his club in a striking attitude, when the defendant shot him.

On these facts the court permitted the jury to say whether the arrest at the cafe, or the attempted arrest at the time of the homicide, was lawful or unlawful. I concur with Mr. Justice FRICK that, as the facts concerning such arrest were without substantial dispute, the question was one of law for the court, and not of fact for the jury, and that the court ought to have charged that the arrest, or attempted arrest, was unlawful. The defendant thus was entitled to a charge as to his rights growing out of and relating to the unlawful arrest. That was important as bearing on the propositions of whether the killing was murder, or but manslaughter, or was justifiable. It undoubtedly is the law that when an officer, in attempting to make an arrest, abuses his authority, or uses unnecessary force and violence, the person so assaulted may, without retreating, repel force by force. Notes and cases, 4 Ann. Cas. 844. Though the arrest may be lawful, yet if the officer in making it should use excessive and unnecessary force to the extent of inflicting on the person arrested great bodily harm or endangering his life, the latter may repel that force by force, and may even slay the officer, if that reasonably appears to be necessary to save himself from such excessive and unnecessary harm or danger. What is the situation when the arrest is unlawful? The proposition is well stated in notes and cases, 33 L. R. A. (N. S.) 147:

"Whether the person whose right to liberty and freedom from illegal arrest is invaded is guilty of any offense when he kills the aggressor depends upon the circumstances of the case. He has no right to kill an officer who attempts to commit a trespass upon his

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person, and nothing more; and the degree of force that he may use in resistance depends upon that used or attempted by the officer. Where a person resists an attempt to arrest him, made without legal authority, and the resistance is only proportionate to the assault, and is provoked by it, the killing, if without malice, is neither murder nor manslaughter."

Again:

"If the authority to make an arrest is wanting, the person attempting it is a trespasser, and the person arrested can resist, using such force only as is necessary to prevent the arrest."

That, as indicated, does not imply that one may resort to a deadly weapon and slay another for a mere attempt to commit an unlawful arrest or a trespass. But true it is one may resist an unlawful attempt to arrest him, and in doing that may use such force as is necessary to prevent the arrest. He, of course, may not slay his assailant, unless that is necessary to save himself from great bodily harm or imminent danger. So, if the wrongdoer, in attempting or making the arrest, resorts to force and violence to compel submission to such unlawful arrest, the person attempted to be arrested and whose rights are thus invaded may repel that force by force, using only so much as is necessary for that purpose; and if the wrongdoer resorts to such force and violence as to endanger the life of him thus attempted to be unlawfully arrested, or to do him great bodily harm, the latter may repel that force by force, even to the extent of slaying the wrongdoer, if that reasonably appears to be necessary to protect his life or to save himself from such imminent danger or harm. Notes to cases, *supra*; 66 L. R. A. 374, 375; 5 L. R. A. (N. S.) 1016; 2 A. & E. Ency. L. 852; 3 Cyc. 1048, and cases there noted. That I believe to be the weight of authority, and that in effect is what the court charged, in the event the jury found the arrest was unlawful.

No complaint is made of that, except that the court ought to have determined that the arrest was unlawful, instead of permitting the jury to determine whether it was lawful or unlawful. If, in case of an unlawful arrest, more force is used than is necessary to resist the arrest, and to prevent great bodily injury or harm, the killing of the arresting offi-

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cer may be manslaughter or murder, depending upon the question of whether the killing was done in sudden passion provoked by the unlawful arrest, or whether it was done with malice. In many instances the killing of a person attempting an unlawful arrest is but manslaughter, because provoked by the unlawful arrest and done in sudden passion, and without malice. And that is the general rule, unless the evidence shows previous or express malice. Notes to cases, 66 L. R. A. 374; 8 L. R. A. 536.

Whether the case here was murder, or but manslaughter, or justifiable homicide, was, I think, a question of fact, requiring a submission of same to the jury, as was done. True, the evidence as to justifiable homicide is not strong. But, weak as it is, I think that question was properly submitted to the jury. The attempted arrest, as has been seen, was unlawful. The defendant offered to explain. He was refused that. The officer unlawfully seized and attempted to take him in custody. The defendant, without offering any violence or force, ran away. He had a perfect right to do that. Without attempting to repel force by force, he fled. It is said he fled to prevent an arrest. Of course he did. But he fled from a wrongdoer, from one who had unlawfully seized him, fled to prevent further unlawful assaults on him and further invasions of his rights, fled to prevent an unlawful arrest. No crime or wrong was committed by the defendant in that. The officer and Massi, both armed, pursued him. They had no right to do that. There is some evidence that Massi, in the pursuit, reached for his gun. It is not shown that the officer reached for his gun, or threatened or attempted to shoot. But this much is clear: That the officer and Massi intended to use whatever force and violence was necessary to compel the defendant to submit to the unlawful arrest, even to the extent of inflicting on him great bodily injury, if that was necessary to compel him to submit; that is, they pursued him with the intent to forcibly recapture, reseize, and retake him, at all hazards. That they had no right to do. The fact that the deceased was a police officer made no difference. He, no more than a civilian, had the right to unlawfully pursue another and forcibly compel a submission to an unlawful arrest. So,

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whether the defendant shot under a reasonable apprehension of imminent danger, or to save himself from great bodily harm, was, under the circumstances, and in the light of the evidence respecting his mental condition and state of mind, a question of fact, which was properly submitted to the jury. But, wholly independent of that defense, the unlawful arrest was also important as bearing on the questions of whether the killing was manslaughter, or murder, or first or second degree murder, all of which were also submitted to the jury.

I also concur with Mr. Justice FRICK that the charge as to premeditation and deliberation is erroneous. It is well recognized that to constitute first degree murder it is not enough to show an unlawful, intentional, and malicious killing. The elements also of premeditation and deliberation must be present. It is just as well understood that to premeditate means to think over, to revolve in the mind, beforehand; that to deliberate means to reflect, to consider, to weigh with a view to a choice or decision. That is what the words themselves imply. It also is true that neither length nor shortness of time between the intent and the act is the controlling factor of premeditation or deliberation. The time in a given case may be so long where the inference of premeditation or deliberation is most convincing. It may be so short where the absence of the inference is just as persuasive. The time may be more than ample for full meditation and most careful consideration, yet where the facts and circumstances may show the absence of premeditation or deliberation, or it may be so short as to be difficult of measurement in minutes or seconds, but where the facts and circumstances may, nevertheless, justify the inference of premeditation and deliberation. These things are so, not because there is any such rule or principle of law controlling them, or upon which they depend, but because of the facts and circumstances of the particular case. The law does not, nor in the very nature of things can it, fix a maximum or minimum time for premeditation or deliberation. That is something not depending upon or governed by any rule or principle of law, but upon and by the facts and circumstances of the case. It is the duty of the court to charge the jury the law applicable to the case,

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and in that connection to charge what is meant by premeditation and deliberation, for these terms, in the law, have a well-defined meaning. But the court is not required, nor is it proper, to go beyond that, and also charge on principles of psychology, by telling the jury how quick or how slow the mind works under given circumstances, or how long or how short it may take one generally, or the accused, to premeditate or deliberate, or how long or how short a time is required to do that in a given case. True, the rapidity with which the mind at times may work is common knowledge; but it is not of that kind of common knowledge which the court in a given case may judicially notice and declare, either generally or specifically, as a rule of law or evidence, for that is something wholly within the province of the jury. The court defined premeditation to be "thought of beforehand; \* \* \* a determination to kill deliberately formed." That is something requiring meditation beforehand; something considered and weighed; reflected on. Then the court destroyed it by charging that:

"There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as the successive thoughts of the mind."

That is a space of time incomprehensible, and is characterizing two things, the intent and the act, about as instantaneous as the earth's rotation and revolution; two things at the same time, instantaneous. It is said such charges have been approved. Let that be so. Still a space of time between two things as instantaneous as successive thoughts is just as inconceivable now as it was before such decisions. What has or can be said by any judge, court, or philosopher of the law, to render it comprehensible? It seems incongruous to tell a jury that, before they can convict of first degree murder, they must find beyond a reasonable doubt that the killing was done with premeditation and deliberation, as those terms are defined and understood in the law, and then tell them that premeditation and deliberation may nevertheless exist, though the act follows the intent as instantaneous as successive thoughts. It is bad enough to tell a jury some incomprehensible thing, but still worse to tell them that is good enough on which to predi-

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cate a finding of premeditation and deliberation. I think those courts which have taken the view that such a charge destroys the distinction between first and second degree murder are supported by the better reason. Especially do I think the charge here harmful because of the controlling questions in the case: The question as to whether the killing was done in sudden passion and under excitement provoked by an attempt of an unlawful arrest or whether it was done with malice, or with malice and premeditation and deliberation; and, as bearing on these, the question of the defendant's mental capacity and state of mind, due to epilepsy and intoxication.

I also concur with Mr. Justice FRICK on the other points discussed, and conclusions reached by him. Because of my concurring with him in holding that the question of whether the arrest was lawful or unlawful was, on the undisputed evidence, one of law, and that the court ought to have held that the arrest or attempted arrest was unlawful, and in holding that such question was material in determining whether the killing was manslaughter, or murder, either first or second degree, or was justifiable, and because of the views expressed by me on those subjects, I am, in Mr. Justice McCARTY'S opinion, holding something not sustained by the authorities, and which, as he thinks, leads to "absurdities" and to most baleful consequences.

It is not controverted that, on undisputed evidence, the question of whether an arrest is lawful or unlawful is one of law and not of fact. So that is not what divides us. Nor is it disputed that by the statute it is provided that, when an offense is not committed in the presence of the officer, he may make a lawful arrest without a charge or warrant, "when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." In portions of his opinion, it seems, Mr. Justice McCARTY treats the matter that an arrest in 'the daytime, without a charge, or warrant, for an offense not committed in the presence of the offer, is lawful, if the officer has but reasonable cause to believe a felony has been committed, and reasonable cause to believe the person arrested to have committed it. At least such a conclusion seems justifiable from language used by

him in parts of his opinion. However that may be, the opinion of course, speaks for itself. I do not think the statute means that; and from what is said and decided in the prevailing opinion it necessarily follows that the same conclusion is there reached. In other portions of his opinion, Mr. Justice McCARTY, on the facts, takes a most decided stand that a felony had been committed by the defendant. As to that, both Mr. Justice FRICK and myself take the view that, on the record, there is nothing to show that a felony had been committed by the defendant. If we as to such view are wrong, and Mr. Justice McCARTY is right, then, of course, was the attempted arrest lawful, the charge permitting the jury to determine whether the arrest was lawful or unlawful not harmful to the defendant, and all that I, or Mr. Justice FRICK, said from the viewpoint that the arrest was unlawful, and as to the materiality of it is for naught. To support the conclusion that no felony had been committed by the defendant, I referred to the evidence bearing on that point. I think the evidence clearly supports the conclusion. Mr. Justice McCARTY is of different opinion. If I am wrong as to that, then is my premise wrong. If I am right, then is my premise right. And if my premise is right, and since admittedly the claimed offense for which the defendant was arrested or attempted to be arrested was not committed in the presence of the officer, and on charge made, or warrant issued, then, because of the statute, follows the conclusion that the arrest or attempted arrest was unlawful, unless (1) the statute means that an arrest is lawful if the officer has but reasonable cause to believe a felony has been committed, and (2) that the officer here making the arrest had reasonable cause to so believe. The first is not true because the statute does not admit of any such interpretation. If the first is not true, the second is not true. Though the first were not true, still the second is not here true, because there is no evidence to justify a finding that the officer had reasonable cause to believe a felony had been committed. All there is to support it is that Massi, in response to the officer's inquiry, "What's the trouble?" threw his coat back, saying, "This is the trouble," and exhibiting "a scratch on the shoul-

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der," or a rent or tear in the shirt. That, as far as made to appear, is all the knowledge the officer had as to the commission of a felony. What Massi, or another, or others, may elsewhere have said to him concerning the encounter between himself and the defendant in the saloon, where it is claimed the felony was committed, is not disclosed.

Thus, on a review of the record, did I reach the conclusion, concurring with Mr. Justice FRICK, that the arrest or attempted arrest of the defendant at the cafe, and at the time of the homicide, was unlawful, and that the court ought to have so charged, and expressed views on the materiality or importance of that question as bearing on the issues submitted to the jury, including that of justifiable homicide, and more especially as bearing on the question of whether the killing was done in sudden passion and under impulses provoked by the unlawful arrest or attempted arrest, or with malice, or with malice and premeditation and deliberation. Saying that, or pointing to evidence, slight though it may be, as tending to support the issues, or some of them, or attempting to show the relevancy or materiality of some fact or factor in evidence and as bearing on the issues, does not justify arguments on improbability of facts, weight of evidence, or credibility of witnesses, or ultimate conclusions as to the guilt or innocence of the accused, nor justify conceptions of supposed emergencies under which an officer may or may not be justified in making an arrest. It is enough to know no emergency is here shown, and enough to decide, on the facts of this, and not on different facts of some other supposed case, whether the arrest here was lawful or unlawful, and, if unlawful, what materiality that had. My conclusions of course, may be carried to any logical extent thought proper. If they do not stand the test, then must they fall. But the validity of the syllogism should not be made to depend upon disagreements of premises, or substitutions of conclusions for major premises, nor upon the commercial geography of Salt Lake, or its tourist trade.

A further point is made that the officer was justified in arresting or attempting to arrest the defendant because the



defendant then had a gun, a deadly weapon, concealed on his person in violation of an ordinance, and hence committed, and then was committing, an offense—a misdemeanor—in the presence of the officer. There are two answers to that: First, it is most conclusively shown that the defendant was arrested, or attempted to be arrested, wholly because of the encounter between him and Massi in the saloon, and not for carrying a concealed weapon; and, second, that the officer had no knowledge that the defendant then had a gun on his person. Thus the officer's conduct in arresting or attempting to arrest the defendant cannot be justified on any such ground, for that was unknown to him, and not the cause, either directly or indirectly, of the arrest, and in no way induced or influenced the officer's conduct or actions in making or attempting to make the arrest. *Snead v. Bonnoil*, 166 N. Y. 325, 59 N. E. 899.

McCARTY, J. (concurring in part and dissenting in part).

I do not think the instructions complained of were prejudicial to the rights of the defendant. I am of the opinion, however, that some of the instructions assigned as error were much more favorable to defendant than the facts warranted. Especially is this so with regard to instructions Nos. 15 and 16, which should be read together and considered in connection with the facts on which they are predicated. These instructions are as follows:

"15. You are instructed that an arrest is made by an actual restraint of the individual arrested, and that an arrest is lawful when made by a member of the police force of any city, in either of the following cases: (1) For a public offense, created either by city ordinance or by the statutes of the state, committed or attempted in the presence of the arresting officer; (2) when the person arrested has committed a felony, though not in the presence of the arresting officer; (3) when a felony has been in fact committed, and the arresting officer has reasonable cause for believing the person arrested to have committed it; (4) upon a charge made upon a reasonable cause of the commission of a felony by the party arrested.

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"16. You are instructed that, if an arrest by a police officer is unlawful, then the person so arrested may resist such arrest, and may use such force as is necessary to prevent the arrest; but in such resistance the person so arrested is not justified in using a deadly weapon, unless the conduct of the officer is such as to raise in the mind of a reasonable person, situated as was the defendant, the reasonable belief that he is about to suffer death or great bodily harm at the hands of such officer, whereupon he, as in any other case, may act in self-defense for the purpose of protecting his person from injury, and may offer such resistance to the force used or threatened against him as to him is apparently necessary to prevent the threatened injury, to wit, death or great bodily harm; and if in such a case the person so arrested shoots and kills the officer, under such circumstances as to constitute self-defense as herein defined, then the law does not hold him responsible for the act, and he should not be convicted. If the arrest is lawful, the police officer making the same is justified in using such force as is reasonably necessary to secure and detain the person arrested, or to prevent his escape, or to recapture him if he escapes."

The facts and circumstances which led up to and culminated in the arrest of defendant, so far as material here, are as follows: The defendant at about eight o'clock in the morning of June 25, 1913, the morning of the homicide, had an altercation with one Pete Massi in a saloon in this city, and, according to defendant's version, a fight ensued between them. Defendant testified that Massi was in the act of striking him with a beer bottle when he, the defendant, drew a razor from his pocket.

"Q. What did you grab the razor for? A. Because I was afraid of him. Q. How did you think the razor would help you? A. Because he might throw away the bottle if he saw the razor in my hand. \* \* \* I did not intend to use it. I thought Pete Massi would turn me loose as soon as he saw the razor. I did it to scare him. Q. Did you cut him with it. A. I don't remember."

Charles Fina, the proprietor of the saloon in which the trouble occurred, and who in a general way observed what

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happened between defendant and Massi on that occasion, testified:

"Pete had Johnnie down on the floor . . . in a kind of sitting position. . . . I did not see any blows struck, . . . I told them, 'You people cut that out.' They got up and came in front of the bar, and Johnnie called Pete and said, 'Let's have a drink.' After the drinks Pete said, 'I am cut on the shoulder.' He took back his shirt, and there was a little bit of a wound there—merely brought blood. It made him mad, and he wanted to use my telephone. I said, 'You can't do it; you use no telephone here to call officers.' After the drinks they went out. Q. Was there any bruise or injury of any kind to either of the parties, other than you have stated? A. No, sir."

Cross-examination:

"He (Massi) was holding Johnnie down. He was over Johnnie—Johnnie was on the bottom. Q. And you made him get off? . . . A. I did not make—I asked him to. I said, 'If you want to fight, take it out of doors with you; there will be no fighting in here.' Q. You saw the defendant do nothing? A. Do nothing direct. . . . Q. Pete had an empty bottle in his hand, striking at John? A. No, sir; I could not see no empty bottle; no, sir."

The undisputed evidence, therefore, shows that these parties, in anger, engaged in a "scuffle," and according to defendant's evidence, a fight; that Massi threw defendant onto the floor in a sitting position, and while he had him in that position defendant drew a razor which he happened to have in his pocket; that immediately after the scuffle ceased Massi discovered that he was cut on the shoulder, and was in the act of telephoning to the police, but was prevented from so doing by the proprietor of the saloon in which the trouble occurred; that after the difficulty, and before he was arrested, the defendant dispossessed himself of the razor. He testified, however, that he did not remember what he did with it. The fact that he immediately after the difficulty, in some manner which he failed to disclose, although given an opportunity to do so, disposed of the razor, was at least an incriminating circumstance, when considered in connection with other evidence

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respecting the difficulty in the saloon. I think the only reasonable conclusion deducible from these facts is that the wound on Massi's shoulder was inflicted by the defendant with the razor. In determining whether Officer Griffiths acted within the authority conferred on him by law in making the arrest, the question of whether Massi or the defendant was the aggressor in the scuffle is not of controlling importance. The officer was not required to examine into the merits, examine witnesses, etc., and in effect judicially decide which of these parties, Massi or the defendant, was at fault, before making the arrest. Section 4195, C. L. 1907, provides that:

"Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of another, with a deadly weapon, instrument, or other thing, is punishable by imprisonment in the state prison," etc.

The undisputed facts, as I read the record, are amply sufficient to support a finding by a jury that defendant assaulted Massi with a razor. And a razor when used as a weapon is a "deadly instrument or thing." The officer, therefore, was, under section 4637, C. L. 1907, authorized to arrest the defendant when his attention was called to the assault. The question of whether the assault was without "just cause or excuse," or whether there was any "considerable provocation" for it, were questions which as stated, the officer was not called upon to determine before taking the defendant into custody.

Counsel for defendant seem to contend, if I correctly understand their position, that the officer was not informed that the defendant had assaulted Massi with a razor, and hence the arrest was unlawful. While there is no direct evidence that the officer was advised of the assault, except the action of Massi in exhibiting to the officer at the time the arrest was made, the wound on his shoulder and making the remarks in relation thereto herein set forth, yet the only inference permissible, as I view the evidence, is that he was informed of the assault, and that he was acting on such information when he placed the defendant under arrest. Moreover, de-

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fendant, according to his own admissions, was, at the time he was arrested, in an intoxicated condition, and was carrying a concealed deadly weapon with the intention, in case certain contingencies should in his opinion arise, of using it against a fellow man. His counsel, in their brief, correctly reflect portions of the record, wherein they say that the defendant, at the time he had the difficulty with Massi, "had partaken of six drinks of whisky; he was ill, he had not breakfasted, and his system was not in a condition to resist the effects of the alcohol of which he partook;" that immediately after the difficulty with Massi "he went up town • • • and purchased a gun"; that on his return down town he stopped at a saloon and "took two drinks of whiskey," spoke to the bartender of the difficulty he had had that morning with Massi, and stated to him that he "had bought a gun to protect himself with"; that from the saloon he went to and entered a restaurant, adjoining and contiguous to the saloon, in which he, two hours before, had the difficulty herein referred to, with Massi, took a seat on a box in a room between the dining room and kitchen, and sat there about 15 minutes, when he was arrested by Officer Griffiths; "that the defendant unquestionably at this time was intoxicated." It is therefore admitted that at the time defendant was arrested he had eaten nothing since the evening before; that he was physically weak, and because of his trouble with Massi and the effects of the seven or eight drinks of whisky which he had partaken of within the space of two hours, was in a "confused condition of mind," and had concealed on his person (in violation of law) a deadly weapon which he had purchased and was carrying with the intention of using against a fellow being in case, in his judgment, certain contingencies should arise. The evidence shows that he was in a desperate and dangerous state of mind (his act in shooting down the officer a few minutes after he was arrested shows this); also, that he was in a somewhat intoxicated condition. His counsel vigorously contend, in their printed brief, that his mind at the time of the arrest was at least partially dethroned, and that he was not wholly responsible for his acts. The carrying of the deadly

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weapon was a continuous offense, and was under the admitted facts committed in the presence of the officer.

We are told, however, that an arrest made under these circumstances is unlawful. I am unable to approve of any such doctrine. It is settled by the great weight of authority that under statutes similar to ours an officer may arrest without a warrant a person when he has reasonable grounds for believing him guilty of having committed a felony. In *Murfree on Sheriffs*, Section 1161, the author says that a peace officer "upon reasonable suspicious, founded either on his own knowledge, or the information of others, that a felony has been committed, or such a breach of the peace as will amount to a felony, he may arrest without a warrant." In 3 Cyc. 878, the rule is stated as follows:

"A peace officer may \* \* \* arrest without a warrant one whom he has reasonable or probable grounds to suspect of having committed a felony, even though the person suspected is innocent"

—citing many cases, both of American and English courts.

I am clearly of the opinion that Officer Griffiths, in making the arrest, did not exceed his authority, and that the court should have so instructed the jury.

Let it be assumed, for the sake of argument, that the officer acted too hastily—exceeded his authority—by arresting the defendant in the first instance. He nevertheless, when the defendant, in trying to escape, was overtaken and exhibited the revolver, not only had the right, but it was his duty, to arrest and disarm the defendant. And the defendant could not, under the guise of defending himself or otherwise, legally resist the arrest. As I read the record, the law of self-defense is not involved in this case. The court, therefore, by instructing the jury on the law of self-defense, and by submitting to them the question of whether the arrest was lawful or unlawful, committed error favorable to the defendant, and which could not have prejudiced his rights.

Counsel for defendant have devoted much space in their printed brief to the contention that at the time of the homicide the defendant was greatly excited, "terrified," and that he "honestly believed that his life was in danger, or that he

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was in danger of suffering great bodily harm, at the hands of Massi, and, acting under such fear, fired the shots which resulted in the death of Griffiths," and hence the act could not amount to more than manslaughter. There is not a scintilla of evidence in the record to justify the belief on the part of the defendant that he was in any danger whatever of receiving bodily harm at the hands of Massi from the time he was arrested until he tried to make his escape. The conduct of Massi in going for an officer, instead of taking the law in his own hands and trying to punish the defendant for some real or imaginary wrong which he may have believed he had suffered from the act of the defendant, was, or should have been, proof conclusive that he (Massi) had no intention of resorting to personal violence against the defendant. And the officer did not, nor did he attempt to, search the defendant, who was under his protection, as well as in his custody. Defendant testified that at the time of the altercation in the saloon, about two hours before the arrest was made, Massi threatened to kill him before night, and, believing that his life was in danger, he purchased and armed himself with a revolver for the purpose of resisting the attack which he honestly believed would be made by Massi on his life. The jury might well have concluded that if the facts respecting defendant's trouble with Massi had been as he claimed they were, and that he was induced to purchase the gun because of threats made against his life by Massi, he would have welcomed the presence of the officer, and would not, when arrested, have tried to escape and get from under the protection of the officer. The jury also might well have concluded that defendant knew, or had good reason for believing, that when taken to the police headquarters he would be given an opportunity to explain his entire course of conduct that morning, as well as make known to the officers the threats of Massi, if he made any, against his life, and have him apprehended and dealt with according to law. Moreover, the conduct of these parties—what each of them did—immediately after the termination of the row between them in the saloon, may have weakened, if it did not entirely destroy, the probative force of the evidence of defendant respecting threats

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which he claimed Massi made against his life, and that he honestly believed his life was in danger. As I have pointed out, the record shows that as soon as the row ceased Massi endeavored to use the telephone in the saloon to call a peace officer, but was prevented from so doing by the bartender. About this time both Massi and the defendant left the saloon, and in about two hours thereafter the defendant returned to the saloon with a loaded revolver concealed on his person, and a little later Massi appeared on the scene in company with Officer Griffiths. These circumstances alone, which are not in dispute, were sufficient to support a finding by the jury that, if either of these parties was in danger of being assaulted by the other, Massi was the one in danger, and not the defendant.

I am of the opinion that the instruction (No. 14) respecting intoxication, which is assigned as error, clearly and correctly stated the law on that subject, and that the jury could not have been misled or confused thereby respecting the purpose for which the intoxication of the defendant might be considered.

The court, after giving the jury the statutory definitions of first and second degree murder, very fully, and I think correctly, defined the terms "deliberate" and "premeditated." These instructions are inserted in full further along in this opinion. The court's instruction (No. 6) defining "premeditation" is assigned as error. It is vigorously contended on behalf of defendant that the instruction obliterates the distinction between first and second degree murder. Of course, if such is its effect, the giving of it was and is prejudicial error. But does it have that effect? I think not. In support of the contention that the instruction does not properly distinguish between the two degrees of murder, the following cases are cited: *State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38; *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742; *State v. Carr*, 53 Vt. 42; *People v. Majone*, 91 N. Y. 211; *Allen v. United States*, 164 U. S. 495, 17 Sup. Ct. 154, 41 L. Ed. 528; *State v. Rutten*, 13 Wash. 203, 43 Pac. 30; *State v. Moody*, 18 Wash. 165, 51 Pac. 365; *Ross v. State*, 8 Wyo. 384, 57 Pac. 931.

In *State v. Greenleaf* it was contended on behalf of defend-



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ant that the evidence in the case did not justify a verdict of murder in the first degree, and the court, in the course of its discussion of the merits and the principles of law applicable to the case, said:

"As to the element of deliberation and premeditation, while it need not be shown that the killing was deliberated and premeditated for any particular length of time, \* \* \* yet we think it is quite evident, from the kinds of murder which the statute specifically designates as deliberate and premeditated, \* \* \* that the Legislature used the words 'deliberate and premeditated' \* \* \* in their natural and ordinary sense, and intending to exclude from the operation of the death penalty murder committed on the impulse of the moment, without actual deliberation and premeditation."

This is substantially all that the court said on the question of "premeditation and deliberation." As I read the case, it neither approves nor disapproves of the test that the jury in the case at bar were instructed they might make in determining whether the killing of Griffiths was with or without premeditation.

In *State v. Carr* the court said:

"If it [the killing] was premeditated, it would be murder in the first degree. That is to say, if the killing was murder, then, if it was done with premeditation, it would be in the first degree. That term, 'premeditated,' was not meant to require any particular length of time that such premeditation should have been going on prior to the fatal act. But if, in fact, it did precede the act, it gave character to the crime."

The court, in that case, quotes with approval from the case of *Commonwealth v. Daley*, 2 Pa. Law J. 156, as follows:

"Deliberation and premeditation simply mean that the act was done with reflection and conceived beforehand. No specific length of time is required for such deliberation. It would be a most difficult task for human wit to furnish any safe standard in this particular. Every case must rest on its own circumstances. The law, reason, and common sense unite in declaring that an apparently instantaneous act may be accompanied with such circumstances as to leave no doubt of its being the result of premeditation."

Likewise, in the case of *People v. Majone*, there are expressions which seem to support rather than disapprove of the

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instruction. In that case the court, among other things, said premeditation—

“must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And *when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure*, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case.” (Italics mine.)

There is nothing in the case of *Allen v. United States* that is either for or against the instruction in this case respecting deliberation and premeditation. All that is said on the subject is:

“Where the crime (murder) is classified, as in some states, proof of deliberate premeditation is necessary to constitute murder in the first degree.”

In *Ross v. State* the court instructed the jury:

“The law does not require that the willful intent and premeditation shall exist any particular length of time before the crime is committed. It is sufficient if there was a design and determination to kill distinctly formed in the mind of the defendant at any moment before or *at the time the shot was fired*.”

The phrase I have italicized makes the instruction in that case clearly distinguishable from the instruction in the case at bar. The court there held, and properly so, that:

“A design and determination to kill, distinctly formed in the mind *at the time the shot was fired* is not sufficient to constitute premeditated malice.” (Italics mine.)

Where the formation of the design—intent—to kill and the killing are concurrent, or, as stated in the instruction in that case, the “design and determination to kill” are formed in the mind “at the time” of the killing, premeditation cannot exist, and the killing, under such circumstances, cannot be more than murder in the second degree.

The two Washington cases cited, *State v. Rutten* and *State v. Moody*, hold that an instruction such as the one given in this case ignores—“wipes out”—the distinction between the

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two degrees of murder. The Washington court, however, in the case of *State v. Straub*, 16 Wash. 111, 47 Pac. 226, approved an instruction wherein the court charged that:

*"Malice is deliberate and premeditated when it has been dwelt upon at all in the mind, and when the motive or consideration moving to his act has been to any extent mentally weighed. Premeditation may be as quick as thought in the mind of man."*

The Washington court again, in the case of *State v. Moody*, *supra*, approved this instruction. The court, however, makes a distinction which I think is more subtle than substantial between the instruction in the Stroub Case and the instructions given in the Rutten and Moody Cases. In the Rutten Case the language condemned was as follows:

"In deliberating there need be no appreciable space of time between the intention to kill and the act of killing. That may be as instantaneous as the successive thoughts of the mind."

In the Moody Case the language disapproved was:

"All that is necessary is that the deliberate and premeditated intent be formed before the fatal wound is inflicted. It matters not if the wound be inflicted immediately after the forming of the intent. The forming of the deliberate and premeditated intent, and the inflicting of the mortal wound, may follow each other as rapidly as the successive thoughts of the mind."

In the Stroub Case the language approved was:

"Premeditation is the mental operation of thinking upon the act before doing it. \* \* \* Premeditation may be as quick as thought in the mind of man."

The same court, in the case of *State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961, approved of an instruction containing the following language:

"The premeditation and reflection thereon may take place but a moment before the doing of the act, but both states of mind must have actual existence to make the offense murder in the first degree."

I think it is apparent that the same thought is expressed in the instructions given in the four cases. And they seem

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to be the only cases cited that disapprove of, or that criticise the instruction given in this case.

In 21 Cyc. 726, the principle here involved is illustrated as follows:

"Deliberate and premeditated means thought over, considered, or reflected upon beforehand. Hence it is not enough that the design to kill existed at the time of the killing, but it must have been formed before it was put into execution. But if the design to kill has been deliberately formed, the murder will be of the first degree, although that design is instantly carried into effect. Since a deliberate purpose can be formed in an instant, no particular length of time for deliberation and premeditation is required by the law."

Many cases supporting the text are cited in the footnotes on pages 727, 728 and 729. I also invite attention to the many excerpts from recent decisions contained in 3 Words and Phrases (Second Series) 494-496.

In *State v. Morgan*, 22 Utah 162, 61 Pac. 527, this court, speaking through Mr. Justice Miner, said:

"A man may do a thing willfully, intentionally, maliciously, and deliberately from a moment's reflection, as well as after pondering over it a month. He may think and premeditate before doing the act, and do it the same instant he conceives the criminal purpose, as well as if he had premeditated over it for a long time. The statute fixes no time when the deliberation and purpose to kill shall have been formed before the act of killing shall take place."

In the case of *People v. Calton*, 5 Utah at page 458, 16 Pac. at page 906, Chief Justice Zane, speaking for the court, said:

"The intent essential to murder is the state of mind—the intention at the time of the act that causes death. The law does not require deliberation after the intent, and before the act of killing. It does require that a man shall be able and have opportunity to think about the killing, that he may deliberate and premeditate upon it; and whenever the deliberation is sufficient to form therefrom a specific and well-defined intention to kill the person afterwards slain, it is enough to characterize the killing as murder in the first degree."

This is a correct statement of the law on this subject as I understand it. The deliberation and premeditation may take place before as well as after the intent to kill is fully formed

in the mind. For example, suppose a person having some real or imaginary grievance against a fellow being, and his feelings are so wrought up and are so intense toward the person against whom he is aggrieved that he conceives the idea of killing him, and while deliberating and premeditating as to whether to kill or not to kill he unexpectedly meets the party and instantly decides to kill him, and at the very moment the intent to kill is formed he, without provocation or excuse, carries it into execution and kills the party; would not a jury, under such circumstances, be justified in finding the slayer guilty of murder in the first degree? Undoubtedly it would. And this would be so, even if there were "no appreciable space of time between the intention to kill and the act of killing," and the intention to kill and the act of killing may have been "as instantaneous as the successive thoughts of the mind," as charged in the case at bar.

The uncertainty created by the Washington decisions referred to arises because they seem to hold, if I correctly grasp the import of them, that there must be some deliberation and premeditation after the design and intent to kill has been formed in the mind in order for the killing to constitute murder in the first degree. And my brethren here seem to have fallen into the same error. As stated, the intention to kill may be the result of, and may be formed after, the deliberation and premeditation.

Since the instruction in this case is held error, and the cause is to be reversed and remanded to the lower court for a new trial, the question arises: What space of time within the meaning of the law is "appreciable," and what is the minimum space of time that can elapse for premeditation after the intent to kill is formed in the mind and the act of killing to make the killing murder in the first degree? Is the fraction of a second sufficient, or does it require one, two, three, or more seconds? I think the trial court should be advised on this point; otherwise, the error may be repeated, or a more glaring one committed, on a retrial of the cause. It may be said that the prevailing opinion furnishes a sufficient guide in that regard. But does it? The test is: Would

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an instruction couched in the language of the prevailing opinion express a different thought, or the same thought in plainer and less uncertain language, than that expressed in the instruction given. By placing in columns, and side by side, the instruction given and what is said in the prevailing opinion suggesting in a general way as to what a proper instruction on the subject should contain, I think it will be observed that, while there is a variance in the phraseology of the opinion from that of the instruction which, if followed, would change the form, but not the substance, of the instruction, the same idea is conveyed—the same thought expressed—in the two columns respecting the term “premeditation.” Therefore, as I view the case, for the prevailing opinion to go down in its present form will tend to confuse, rather than enlighten, the trial court on this point.

## Copied from Prevailing Opinion.

“No attempt should be made to fix any *definite space of time* which is necessary to constitute the premeditation required by our statute. \* \* \* Why not tell them (the jury) that while it is not necessary that there be any *definite or fixed period of time* for premeditation, and that *no fixed or definite time can be stated*, yet that some space of time, however brief, for premeditation, is necessary before the fatal shot is fired or the fatal blow is struck, and that if they find that there was a fixed design or purpose in the mind of the accused to kill *for any space of time, however brief*, before he commit-

## Instruction (No. 6) as Given by the Court.

“Deliberate means a cool state of the blood, a state of mind contradistinguished from heat or sudden passion, caused by great provocation. It does not, necessarily, include within its import brooding over, considered, or reflected upon for any considerable length of time, but it means an intent to kill, executed by the party not under the influence of a violent passion, suddenly aroused, but in the furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose.

“Premeditation means *any length of time, however thought of beforehand, for*

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ted the fatal act, and that he committed the same pursuant to such design or purpose, then the killing would constitute murder in the first degree." (*Italics mine.*)

"The jury should also be informed in that connection that in determining the question of such design and premeditation they should take into consideration all of the facts and circumstances developed at the trial."

*short.* There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as the successive thoughts of the mind. It means a specific intention to take human life, *thought of beforehand.* If there is such a design, or determination to kill, deliberately formed in the mind at any moment *before the fatal act is done*, it is sufficient." Excerpt from Instruction No.

23.

"It is your duty to consider the evidence all together, fairly and impartially and conscientiously, and you should arrive at your verdict solely from the evidence introduced upon the trial."

Instruction No. 24.

"These instructions are to be considered all together, as a whole, carefully and conscientiously. You should not single out one part and give it undue weight. All the law on a particular subject may not be stated in a particular paragraph or in a single instruction.

"The different subjects discussed in the instruction should be kept in mind, and the evidence considered and weighed in the light of all the instructions."

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It is suggested that what I have said "shows that the writer of the (this) opinion regards the question of time as one of law rather than one of fact." Since what I have said on this point is susceptible of a construction just contrary to what I intended should be given the language used, I shall endeavor to make plain my position and to convey the thought intended. The idea I intended to convey is this: That the question of whether there was deliberation and premeditation, of either long or short duration, is purely a question of fact for the jury. And this is what I think the court, in substance, charged the jury in this case, namely: That where the intention to kill follows and is the result of deliberation and premeditation, then "there need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as the successive thoughts of the mind." The logic of the prevailing opinions, as I read them, is that there must be "appreciable time between the intention to kill and the act of killing." I was, and am still, of the opinion that it is the prevailing, and not the dissenting opinion that holds that the "question of time is one of law rather than one of fact." If the court erred in charging the jury that "there need be no appreciable space of time," etc., it is because there must be, as a matter of law, some "appreciable time." And I therefore repeat that the question arises, What space of time, within the meaning of the law as thus declared by the prevailing opinions, is "appreciable"?

The instruction given in this case contains the following propositions: (1) That "premeditation means thought of beforehand"; (2) that a "design or determination to kill, deliberately formed in the mind at any moment before the fatal act is done," is sufficient to constitute murder in the first degree; (3) that the act of killing after the intention is deliberately and premeditatedly formed in the mind may be "as instantaneous as the successive thoughts of the mind." Under practically all of the authorities, as I read them, this is a correct statement of the law on the question under consideration in this class of cases. Furthermore, the instruction is predicated on substantial evidence. The contention,



therefore, of counsel, that the jury were not warranted in finding that the killing was deliberate and premeditated, is untenable. I have examined the record with more than ordinary care, and am convinced that here is abundant evidence to sustain the verdict. One witness, who was in the vicinity of the place where the homicide occurred and saw the shots fired, testified that while she was in the act of emptying a tub of water from an "upstairs" window her attention was attracted by two men "hollering"; that she saw Officer Griffiths and the defendant standing facing each other; that Griffiths had hold of defendant's shoulder; that she heard some one say, "Stand back!" that Griffiths held up his police club, and said, "Hands up!" and immediately thereafter the shots were fired. Another witness, who claimed that he saw the last one of the three shots fired that killed Griffiths, testified that:

"After the third shot was fired, and before the officer's body came to the ground, the defendant backed off a few feet facing the officer, and after the officer had fallen, he turned \* \* \* and went south. I saw the revolver in the possession of the defendant. As he was backing, the revolver was pointed directly out in the direction of the officer."

Another witness also testified to substantially the same thing. This evidence, considered in connection with other evidence in the case, is amply sufficient to sustain a verdict of murder in the first degree.

The assignment of error directed to the admission in evidence of the articles referred to in the prevailing opinion, found in defendant's room a few hours after the homicide occurred, presents a more serious question, and, with the exception of the assignment directed to conduct of counsel in propounding objectionable questions, referred to in the prevailing opinion, and objectionable remarks made by counsel during the progress of the trial, and excepted to by defendant, is the only assignment, as I read the record, that contains any substantial merit. The finding of these articles in defendant's room did not prove, nor tend to prove, any material fact, nor were they pertinent to any issue in the case. The jury might well have concluded from this evidence, con-

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sidered in connection with the facts and circumstances leading up to and surrounding the killing of Officer Griffiths, that the defendant was a professional "gunman," "thug" and "hold-up"; and this evidence may have been, and probably was, very persuasive in influencing the jury to withhold a recommendation of life imprisonment, if any one or more of them otherwise felt so inclined. The fact that defendant, while testifying, "voluntarily undertook to explain the presence of these articles in his room" (excepting the two masks and the coat, of the presence of which he denied having any knowledge), did not cure the error, or render it harmless. After the evidence of the finding of this paraphernalia, generally supposed to be used by highwaymen in their career of lawlessness, in defendant's room, he, in order to avoid its damaging effect, was called upon to explain its presence there. The fact that he endeavored to give a satisfactory explanation of the presence of some of the articles in his room and denied that he had any knowledge of the others did not, as stated, render the error harmless. As I read the record, his denial and much of his explanation intensified, rather than neutralized, the damaging effect of this evidence. The Attorney General contends that the evidence respecting the presence of the articles in his room was admissible to show motive for the commission of the homicide. The defendant's entire course of conduct, from the time he broke away from Officer Griffiths until he was arrested several hours later, shows that his motive in killing the officer was to make good his escape. Under such circumstances the state is not required, nor would it be proper for it, to show that the defendant may have, and probably had, committed crimes other than the one for which he is on trial to show motive for the murder.

I concur in the reversal of the judgment on the ground that the articles mentioned were not admissible in evidence, and that the court committed prejudicial error in receiving them in evidence, and on the further ground that the objectionable remarks made by counsel for the state, and the objectionable questions propounded by him to witnesses during the progress of the trial (which are referred to in the prevailing opinion), were prejudicial to the rights of defendant.

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Since the foregoing was drafted, the Chief Justice has written an opinion concurring in the conclusions reached by Mr. Justice Frick. If the opinion correctly reflects the scope of the powers and duties of peace officers in making arrests, then I submit that this state will be, until the law is changed in that regard, a haven and in a metaphorical sense a "city of refuge" for thieves, thugs, burglars and criminals generally. Under the law as thus declared the most dangerous and desperate criminals may have their rendezvous in our cities and incorporated towns, they may with impunity and in violation of law carry, concealed on their persons, deadly weapons with which to strike or shoot down any person—officer or layman—who may have the temerity to resist or interfere with them when in the act of committing crime. Should one of these be pointed out as a person who has recently committed a felony, and some evidence of the alleged crime is furnished the officer, as was done in the case at bar, the officer, before he could lawfully put the party under arrest, must either go before some magistrate, file a complaint charging the accused with having committed the crime alleged, and obtain a warrant, and give the party an opportunity in the meantime to make his escape, or make inquiry respecting the merits of the accusation and in a sense judicially determine whether the party accused is guilty of an offense. Should the officer erroneously decide that the party ought to be placed under arrest, and proceed to arrest him without a warrant, the party about to be arrested may resist the officer, and may make use of whatever force may be reasonably necessary to prevent the arrest, and if, in doing so, he uses the deadly weapon which he is carrying concealed on his person in violation of law, and kills the officer, and the killing was necessary in order to prevent the arrest, it is justifiable homicide. I venture the statement that there is not a state in the Union, except Utah, where such a startling proposition has ever been held to be the law, and until the present it has never been so declared in this state.

It may be said that these deductions and conclusions are somewhat extravagant, and are not warranted by the opinion. Let us look at the record and see if they are. It may be

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fairly inferred from the evidence that Griffiths, at the time he was killed, was using and intended to use whatever force was necessary to arrest the defendant. Now the Chief Justice holds, as a proposition of law, that the arrest of the defendant was unlawful. He also holds that where an officer proceeds to make an unlawful arrest the party about to be thus restrained of his liberty may lawfully resist the officer, and in so doing may use whatever force may be reasonably necessary to prevent the arrest. In the case at bar I think the only reasonable conclusion permissible from the evidence is that the only thing the defendant could do to prevent the officer and Massi from taking him into custody after he made his escape was to kill the officer. Therefore, according to the logic of the opinion written by the Chief Justice, the killing of Officer Griffiths was, under the circumstances, justifiable homicide, and the court erred in refusing to direct the jury, as requested by defendant, to return a verdict of not guilty. It therefore necessarily follows, if such is the law, that in this case, and in all similar cases, the officers, and not the criminals whom they are trying to arrest, are the real offenders against law and order.

The inevitable baneful effect—far-reaching consequences—of such a rule, as I view it, may be at least partially appreciated by keeping in mind the location of this state geographically with reference to many of the other states. Salt Lake City, Ogden and other somewhat populous municipalities of the state, situated, as they are, on the trunk lines of the great railway systems of the country, which lines extend from the Atlantic Ocean on the east to the Pacific Ocean on the west, make of these cities and municipalities, a natural stopping (resting) place for tourists, business men, and people generally passing through the state on their way from one coast or part of the country to another. It is a matter of common knowledge that the people of this state, acting through their commercial, social and professional clubs, and their business, religious and social organizations, have extended a standing invitation to the traveling public who may pass through the state to “stop over” on their journey and “get acquainted,” with the assurance that a cordial and hearty welcome will be

extended to all respectable people who chance to avail themselves of this state-wide invitation. It necessarily follows that many professional criminals from other parts of the country take advantage of the situation and "stop over," not for the purpose of "getting acquainted," but to follow their vocation of fleecing and robbing tourists and other people who may be visiting the state, as well as burglarizing and pillaging homes, and robbing and committing other crimes against the people of the state. I therefore repeat that, if the opinion written by the Chief Justice reflects the law as it shall be enforced in the future by the peace officers in dealing with the criminal element, it seems to me that the state will be an oasis for thieves, thugs, hold-ups, burglars, and criminals generally, who, until they commit some crime and are apprehended therefor, are given the freedom of our cities. Should one of them be pointed out as a person who has committed a felony, before the officer could lawfully arrest the party, he would be compelled to go before some court or magistrate, file a complaint, and obtain a warrant, and thereby give the criminal an opportunity to "move on" and make good his escape.

Let us see if the application of the law, as it is declared by the Chief Justice, to the facts of this case, does not fully support what I have said regarding its application to like cases in the future. The defendant, according to his own testimony, was engaged in a saloon brawl or fight, and when he saw that Massi was getting the best of the fight he drew from his pocket a razor and opened it for the purpose, as he says, of protecting himself. When he and Massi, at the request of the bartender, ceased fighting, it was discovered that Massi was cut on the shoulder, and Masis then and there started to put in a telephone call for for a peace officer, but was prevented from so doing by the bartender. Massi and the defendant then left the saloon. The defendant, in some way which he failed to disclose, disposed of the razor, went "up town" and purchased a revolver, and returned with it concealed on his person, in violation of law, to the immediate vicinity of where he had the trouble with Massi. Soon thereafter Massi returned to the place accompanied by Officer Griffiths. The officer placed his hand on the defendant's

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shoulder and said, "What is the matter, boy?" Massi directed the attention of the officer to the cut on his shoulder, and said, "That's what's the matter." The officer then said, addressing the defendant, "You had better come with me," and placed him under arrest. There is some evidence to the effect that, when the officer arrested the defendant, he "grabbed him by the shoulder \* \* \* in rather a rough manner and pulled him into the outer room." The jury might well have concluded, from the civil manner in which the officer approached the defendant, and the kindly and gentlemanly way in which he addressed him, as indicated by the language used when he placed the defendant under arrest, that he used no more force than was absolutely necessary. The officer did not even subject him to embarrassment and humiliation by searching him in the presence of his friends and acquaintances. It may be said, however, that for the officer to have searched and disarmed the defendant would have been a further unlawful encroachment on his inherent and constitutional rights; and it necessarily follows that, if the arrest in the first instance was unlawful, any further invasion by the officer of the person of defendant, or an interference with his property, would have been unlawful. It nevertheless is apparent that, if the officer had been less considerate and forbearing, and had searched the defendant and disarmed him, the officer would not have been killed, and the defendant would not be under sentence of death. As hereinafter stated, a few moments after the defendant was arrested, he broke and ran away from the officer, and when the officer was in the act of rearresting him he turned and shot the officer, killing him almost instantly.

Reference is made to evidence tending to show that at the time the shots were fired the officer had hold of the defendant, with his club raised as if in the act of striking him. From this it is suggested, and by counsel urged, that the defendant may have been terrorized, and was in fear of receiving great bodily injury at the hands of the officer, at the time the fatal shots were fired. The evidence shows that the defendant discharged the gun with his left hand, his right having been cut and partially disabled with the razor, which the

facts, as I read the record, tend to show that he used on Massi in the saloon. Keeping in mind the partial disability of the defendant, and the attitude and demeanor of the officer towards the defendant up to this time, and the celerity with which the officer could have used his club, which he undoubtedly carried in his hand ready for instant use, the jury might well have concluded that the defendant drew his revolver before the club was raised, and before the officer had an opportunity to use it. In other words, the jury were warranted under the circumstances in concluding that, if the officer had had his club raised at the time the gun was drawn, he could, and probably would, have dealt the defendant a crushing blow and prevented him from using the weapon, and that he raised his club to protect himself, but was too late. The officer, as I view the case, neglected a duty he owed to his family, himself, and to the state by not having his gun in his hand, instead of his club, and shooting the defendant down when he started to draw his revolver.

As I view the evidence, and understand the law applicable thereto, the arrest made by Griffiths was as clearly within the law, and in the line of official duty, as was the arrest of defendant by the officers a few hours after the homicide. There was, however, this difference in the cause for these two arrests, which in no way affects the legal phase of the question. When the first arrest was made, the circumstances pointed to the commission by defendant of one felony only, but, when the second arrest was made, the facts and circumstances, as I read the record, tended to show that defendant had committed two felonies. In fact, when finally arrested, he had added a third to his list. His attempt to draw his revolver and shoot the officer making the arrest was, within the meaning of the law, a felony. While it is true that the defendant is not on trial for carrying concealed on his person a deadly weapon in violation of the law, or for assaulting Massi or the officers, the evidence relating to these transactions is, nevertheless, germane to the case. It tends to show, among other things, that the defendant is not the gentle, peaceable, harmless and inoffensive person that some of the witnesses claimed him to be.

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Reference is also made to evidence tending to show that Massi may have been armed with a gun, and that he made threats in the saloon at the time he and defendant had the row, herein referred to, to the effect that he intended to and would kill the defendant before night. The question of whether Massi was armed or unarmed at the time Griffiths arrested the defendant cannot, as I view the record, have any bearing, directly or indirectly, on the case. The defendant is not charged with having killed Massi, nor does the evidence show that there was anything said or done by either the officer or Massi, from the time the defendant was arrested until the officer was killed, to justify a belief that the defendant was in any danger whatever of either losing his life or of suffering bodily injury at the hands of Massi. The conduct of Massi, what he did from the time the row he had with the defendant in the saloon was over until Griffiths was killed, tends to show that he did not have a gun. Assuming, for the sake of argument, that he did have a gun, his conduct tends to show that he had no intention of using it against the defendant. When Officer Griffiths was shot and fell to the ground, Massi was, at most, only a few feet from the defendant, and undoubtedly had an opportunity to shoot him down, and under the circumstances he would have been justified in so doing. But he did not do so. Nor is there a scintilla of evidence that he there made any attempt to either kill or maim the defendant. The jury were therefore amply justified in rejecting as unworthy of belief the testimony of defendant that Massi had a gun and that he had made threats against his life.

The falacy of the doctrine announced by the Chief Justice, I think, will be fully appreciated by applying it to the facts and circumstances under which defendant was arrested a few hours after the killing of Officer Griffiths. There is not a scintilla of evidence that shows, or tends to show, that the officers making the arrest acted under or in pursuance of a warrant issued by a magistrate for the arrest of defendant. Nor is there anything in the record that tends to show that a complaint had been made before a magistrate charging the defendant with any offense. I think it may be fairly in-



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ferred, there being no evidence to the contrary, that the officers making the arrest acted without a warrant. Applying the rule of law as announced by the Chief Justice to the facts of this case, as I view them, the killing of Griffiths was nothing more than justifiable homicide, and the defendant was not guilty of any crime. The arrest, therefore, having been made without a warrant, if it was so made, was unlawful; and the defendant, under the rule, was justified in using whatever force was reasonably necessary to prevent the arrest, and having failed to kill the officers, as he attempted to do, it follows that he, as a proposition of law, has a cause of action against them for an unlawful arrest and for false imprisonment. It goes without saying that judicial recognition of any rule that would lead to such an absurdity would be making a travesty of the law, and of justice the worst of mockeries, and which, if followed, would soon bring the law and the courts that administer it into merited contempt.

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**SALT LAKE INV. CO. v. OREGON SHORT LINE-R. CO.**

No. 2622. Decided December 1, 1914. Rehearing Denied May 8, 1915 (148 Pac. 439).

1. **LIMITATION OF ACTIONS—TAKING PROPERTY—ACTION FOR COMPENSATION.** An action for compensation for the taking of land, where the pleadings admitted defendant railroad's entry upon the land, and its occupation thereof by its railroad tracks without the consent of the plaintiff or any condemnation proceedings, was not governed by Comp. Laws 1907, section 2877 subdiv. 2, relating to actions for waste or trespass to real property, nor by section 2883, relating to actions for relief not otherwise provided for, but by section 2860, requiring actions or defenses founded on realty to be commenced within seven years.<sup>1</sup> (Page 207.)
2. **EMINENT DOMAIN—ACTION FOR COMPENSATION—WAIVER OF TORTS.** Under the constitutional and statutory provisions requiring compensation to be first made for private property taken for public use, the owner of property entered upon and appropriated to public use without compliance therewith may waive the tort and sue for compensation. (Page 207.)
3. **EVIDENCE—OPINION EVIDENCE—MARKET VALUE.** Opinion evidence as to the value of land taken must be restricted to its fair market value, so that a witness may not give his own opinion as to value. (Page 210.)
4. **EVIDENCE—OPINION EVIDENCE—QUALIFICATION—MARKET VALUE.** In an action for compensation for land taken for public use, a witness for plaintiff who had been in the real estate business in the locality for twenty years or more, who for fifteen or eighteen years had been acquainted with land and springs in the vicinity, who knew of the land and spring in suit, the character, quality and volume of water, and its situation with respect to other springs, was qualified to express an opinion as to its market value. (Page 210.)
5. **APPEAL AND ERROR—REVIEW—NECESSITY OF OBJECTION BELOW.** Where defendant objected to the testimony of an expert witness on the ground that no proper foundation had been laid and

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<sup>1</sup>*Stockdale v. Railroad*, 28 Utah, 201, 77 Pac. 849; *Morris v. Railroad*, 36 Utah, 14, 102 Pac. 629; *O'Neill v. San Pedro, etc., R. Co.*, 38 Utah, 475, 114 Pac. 127.

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that he was not qualified, it could not on appeal claim that the admission of his opinion was erroneous in that he stated his "own opinion" as to value, instead of his opinion as to the market value. (Page 210.)

6. **APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY CHARGE.** In an action for compensation for land taken for public use, any error in permitting a qualified witness to state his own opinion as to the value of the land, instead of his opinion as to its market value, was cured by a charge that the jury might allow the market value of the land at the time it was appropriated and a charge at defendant's request that damages were to be measured by the fair market value and that the verdict could not be based on any expressions of opinion of value unless stated to be of the market value. (Page 211.)
7. **EVIDENCE—OPINION EVIDENCE—VALUE.** The rule governing the competency of opinions is not so strictly applied to questions of value as to any other subjects, especially where the jury are given the benefit of the facts upon which the opinions are based. (Page 211.)
8. **PUBLIC LANDS—GRANTS TO RAILROADS—CONSTRUCTION—"PUBLIC DOMAIN."** Rev. St. U. S. section 2258 (Act Sept. 4, 1841, c. 16, 5 Stat. 455), provided that lands included within the limits of any incorporated town or selected as the site of a city or town should not be subject to pre-emption rights. After Salt Lake City's incorporation in 1860 and its laying out wholly upon public lands, the land involved was within its corporate limits, and in 1869 a pre-emption declaratory statement to the land was filed by one to whom patent was issued in 1871, which title by mesne conveyances and a tax sale was acquired by plaintiff. Act Cong. Dec. 15, 1870, c. 2, 16 Stat. 395, granted to defendant's predecessor "a right of way through the public lands \* \* \* 200 feet in width on each side of said railroad where it may pass through the public domain," from a point at or near Ogden City to Salt Lake City, which grant was accepted, and a road constructed, the center of which was within 200 feet of the land. *Held*, that "public lands," and its equivalent, "public domain," mean such lands as are subject to sale or other disposal under the general laws; that, though the land was within the city limits and not subject to pre-emption rights, yet the ownership was in the federal government, which had the right to sell or dispose of it; and hence that the grant was a grant of public lands, including the land involved.<sup>3</sup> (Page 212.)

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<sup>3</sup>*Moon v. Salt Lake City*, 27 Utah 435.

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9. **PUBLIC LANDS—PRE-EMPTIONS—CONSTRUCTION.** Act Cong. March 3, 1877, c. 113, 19 Stat. 392, providing that the incorporation of any town upon the public lands should not exclude from pre-emption or homestead entry more than 2,560 acres or the maximum area which may be entered as a town site, unless the entire tract incorporated as such shall include such area and be actually settled and used for business and municipal purposes, and confirming entries upon lands afterwards ascertained to have been within the corporate limits of a town, though only vacant land not settled or used for municipal purposes, was applicable to the city of Salt Lake and to cities and towns laid out exclusively on the public lands, but not to cities laid out mainly on private lands but including public lands, and was intended as a curative act to permit pre-emption entries on public lands though within the corporate limits of a city or town. (Page 212.)
10. **COURTS—RULES OF DECISION—PREVIOUS DECISION OF SAME COURT.** A decision affirming a judgment is of no controlling force in a subsequent case as to any question involved, but not argued or presented, and left unnoticed or not passed on by the court. (Page 216.)
11. **COURTS—RULES OF DECISION—DECISION OF UNITED STATES COURTS—FEDERAL QUESTION.** In the construction of the acts of Congress relating to public lands, involving a federal question, the state court should follow the holding of the Supreme Court of the United States. (Page 217.)
12. **TAXATION—TAX DEED—TITLE.** Where property was not assessed to the defendant or its predecessor, the real owner, but to one not the owner, a sale for taxes and a tax deed conveyed no title and were of no binding effect as against the real owner. (Page 217.)

Appeal from District Court, Third District; Hon. *Geo. G. Armstrong*, Judge.

Action by the Salt Lake Investment Company against the Oregon Short Line Railroad Company to recover compensation for the taking of private property for public use with counterclaim to quiet title.

Judgment for plaintiff. Defendant appeals.

REVERSED AND REMANDED, with directions to set aside the judgment, and to enter judgment in favor of the defendant quieting its title.

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*P. L. Williams, Geo. H. Smith and H. B. Thompson* for appellant.

*M. E. Wilson and E. A. Walton* for respondent.

STRAUP, J.

This is an action, as stated by appellant in its brief, "to recover compensation for the taking of private property for public use." It is charged in the complaint: That the plaintiff is the owner and entitled to the possession of the property, fully described, containing about one acre of land situate in Salt Lake City and county. That at the time of the taking there was on the land a flowing spring discharging hot mineral water of the value of \$20,000. And "that on or about the 1st day of April, A. D. 1906, the defendant, without right or authority of law, and without instituting any eminent domain or condemnation proceedings, and without the consent of the plaintiff herein, entered upon said land above described and occupied the same, and from time to time proceeded to and did dump great quantities of earth, rock, gravel and other substances upon said land, and constructed upon certain portions of the same its railroad tracks, and proceeded to and did occupy the said land, and still does occupy the same for the purpose of operating its railroad over and upon said land. That in dumping said earth, rock, gravel and other substances upon said land, and in constructing said railroad tracks thereon, and in continuing to occupy the same, as aforesaid, the defendant has absolutely destroyed and prevented the flow of water from said spring, and has absolutely destroyed the existence of said spring in such manner as to cause the waters naturally arising and flowing out of said spring to seek other channels and not to arise upon the aforesaid lands of the plaintiff hereinbefore described. And that in its occupation of said land as aforesaid the defendant has thereby wrongfully appropriated said land to its own use and benefit. And that, by reason of the matters and things herein stated and said wrongs done and committed by the said defendant, plaintiff has been damaged in the sum of \$20,000."

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The defendant, by its answer, admitted entering upon and taking possession of the land for railroad purposes, at about the time alleged in the complaint, without the consent of the plaintiff and without the institution of eminent domain or condemnation proceedings; and alleged that it continuously and exclusively thereafter occupied, possessed, and used it for such purposes. It denied plaintiff's title and right of possession and alleged the action barred by statute of limitations. It further, by way of counterclaim, pleaded title in itself, and alleged that neither the plaintiff nor its grantor or predecessor was seized or possessed of the premises within seven years before the commencement of the action; and prayed the title quieted in it.

The case was tried to the court and a jury. The court itself, on the evidence adduced, determined and adjudged that the plaintiff, and not the defendant, was the owner of the property at the time of the alleged taking and that the action was not barred. It, upon instructions, submitted the case to the jury to determine "the compensation, if any, the defendant should pay the plaintiff for the tract of land" in controversy. This was the only question submitted to the jury. They rendered a verdict in favor of the plaintiff for \$4,000.

The defendant appeals, and urges that the action is barred; that the defendant has, but the plaintiff has not shown title; and that error was committed by permitting certain witnesses to express opinions as to value.

The evidence shows the entry and taking to have been in March or April, 1906. The action was commenced in December, 1912, more than six and less than seven years from the taking. The contention is first made that the action is barred by provisions of Comp. Laws 1907, Section 2877, Subdiv. 2, which provide that "an action for waste or trespass of real property" must be commenced within three years. And, if that section is held not applicable, then the further claim is made that the action is barred by the provisions of 1, 2 Section 2883, which provide that "an action for relief not hereinbefore provided for must be commenced within four years." The complaint is broad enough to recover on the theory stated by the appellant, "compensation for the taking

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of private property for public use." The case was tried by both parties, and was without objection submitted to the jury, on that theory. The pleadings admit a taking for a public use and an exclusive and continuous occupation and possession, without the consent of the plaintiff and without the institution of eminent domain or condemnation proceedings. We think in such case neither section referred to is applicable, but that the provisions of Section 2860 requiring actions or defenses founded on realty to be commenced within seven years are. By those provisions the action is not barred. Our Constitution and statute require compensation to be first made for private property taken for public use; and, where property is entered upon and appropriated to public use without complying with the law, the owner may waive the tort and sue for his just compensation. In such case the action is not barred, except by adverse possession for the required period, here seven years. 2 Lewis, Em. Domain (3d Ed.), Sections 889, 967; *Tucker v. Chicago, St. P., Minn. & Omaha R. Co.*, 91 Wis. 576, 65 N. W. 515; *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. Law 605; *McFarlan v. Morris Canal & Banking Co.*, 44 N. J. Law 471; *Hannum v. Borough of West Chester*, 63 Pa. 475; *Stauffer v. E. Stroudsburg Boro.*, 215 Pa. 143, 64 Atl. 411; *Galway v. M. E. R. Co. et al.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788; *In re Clark v. Water Commissioners*, 148 N. Y. 1, 42 N. E. 414; *Land v. Railroad*, 107 N. C. 72, 12 S. E. 125; *Utley v. Railroad Co.*, 119 N. C. 720, 25 S. E. 1021.

We see nothing in the cited cases of *Stockdale v. Railroad*, 28 Utah 201, 77 Pac. 849, *Morris v. Railroad*, 36 Utah 14, 102 Pac. 629, and *O'Neill v. San Pedro, etc., R. Co.*, 38 Utah 475, 114 Pac. 127, which makes against this. Contrary holdings seemingly have been made in other jurisdictions, prominent among them being California and Michigan. *Robinson v. So. Cal. Ry. Co.*, 129 Cal. 8, 61 Pac. 947; *Williams v. So. Pac. R. Co.*, 150 Cal. 624, 89 Pac. 599; *Wood v. Railroad Co.*, 90 Mich. 212, 51 N. W. 265. There it has been held that an action to recover damages for the wrongful entry and construction of a railroad without proceedings for condemnation and without the owner's consent is barred by the provisions of the stat-

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ute prescribing the time in which an action for trespass to real property must be commenced, which, in this jurisdiction, is three years. We think the former are more in harmony with legislative intent, and that the statutes applicable to a recovery such as here—compensation for a taking of real property—are those relating to real actions and rights in and to real property. It would seem when one, without the consent of the owner and without legal proceedings or process, enters upon and takes real property, exclusively occupies and possesses it as his own, and permanently appropriates it to his own use and deprives the owner of all rights in or uses to it, he has done something more than the commission of a mere trespass; he has unlawfully seized, exclusively possessed, and permanently taken it.

A witness for the plaintiff, after showing that he had been in the real estate business at Salt Lake City for twenty years or more engaged in buying and selling real estate, that for fifteen or eighteen years he had been acquainted with the land and spring in question and other lands and springs in that vicinity that he knew of sales that had been made of lands upon which were hot springs, and after describing the land and the spring, the character, quality, and volume of water discharged from it, and its situation with respect to other springs, including what is known as Beck's Hot Springs and the Warm Springs, was asked by plaintiff's counsel:

"I will ask you from your experience and acquaintance with the land in question, and from lands in and about Salt Lake City and the real estate market generally you would have—you could form a somewhat accurate opinion relative to the value of the land described in the complaint and having situated thereon this spring that you have described."

This was objected to by the defendant's counsel upon the ground "that no proper foundation has been laid, it not appearing that the witness is familiar with any purchases or sales or values at the time that is material in issue." The objection was overruled, and the witness answered, "Yes, sir." Then, after further showing by him the beneficial and commercial uses to which waters of the character of the spring



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in question and in that vicinity could be and had been devoted, he was further asked by plaintiff's counsel:

"Taking into consideration the fact that there is about an acre of ground described in this complaint, and that it had situated on it this spring known as the Hobo Spring bubbling forth this flow of water that you have described, I will ask you what that acre of ground, in your opinion, would be worth with the spring flowing thereon as it was prior to its being filled up or covered over by the defendant company?"

This was objected to by the defendant's counsel "as irrelevant, incompetent, immaterial, no proper foundation laid, the witness not qualified." The objection was overruled, and the witness answered: "From \$20,000 to \$25,000."

It is now here argued that the ruling was erroneous because the witness was asked and permitted to give "his own opinion" as to value, instead of his opinion as to the "market value." In support of that, it is urged that:

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"Opinions must be restricted to the fair market value of the land, not the witness' judgment of its value, or its value to the owner. A special value in excess of the market value cannot be shown"—citing 13 Ency. Ev. 487; *Peoria B. & C. Traction Co. v. Vance*, 234 Ill. 36, 84 N. E. 607.

The rule as stated may well be conceded; but how about the objection? The rule, of course, is that objections, to be of avail, must be specific. The only specific objection made, and the ground upon which it was claimed in the court below the evidence was not receivable, were that "no proper foundation was laid; the witness not qualified."

A sufficient and proper foundation was laid to qualify the witness to express an opinion as to the market value. There can be no doubt of that. Nor is that objection here pressed, or even argued. But another not specified in the court below is. It may be that the question was improper, not because the witness was not shown to be qualified, that a sufficient foundation had not been laid, but because it was not sufficiently restricted to market value and permitted the witness to give his opinion of value regardless of the market value. *Peoria B. & C. Traction Co. v. Vance*, *supra*.

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But, since no such objection was made or specified in the court below, the defendant is in no position to here complain on that ground. It may well be presumed that, had the objection specified the ground here pressed and argued, the question would have been so reframed as to call for an opinion as to the market value, or, if not, that the ruling would have been different; for, throughout the whole case, as appears by the record, both parties and the court proceeded on the theory that the true measure of compensation was the market value of the land at the time of the taking. Neither party claimed, nor did the court assume, any other or different theory.

Then, too, we think whatever error may have been committed, if any, in this respect was cured by the court's charge. It is charged:

"You are instructed that the issue in this case is as 6  
to compensation, if any, that the defendant should pay  
to the plaintiff for the tract of land described in the plead-  
ings. And in determining such issue the jury is authorized to  
allow to the plaintiff the market value of said tract of land at  
the time it was appropriated to its use by the defendant."

And, at the defendant's request, further charged:

"You are instructed that the plaintiff's damages are to be  
measured on a basis of the fair market value of the property  
at the time as of which the damages are to be determined, and  
you cannot base your verdict on any expressions of opinion of  
value unless such opinions were stated to be of the market  
value."

And, lastly, the rule governing the competency of opinions  
is not so strictly applied to questions of value as to many  
other subjects. *Mobile, etc., R. Co. v. Riley*, 119 Ala.  
260, 24 South. 858. We think this is especially true 7  
where, as here, the jury were so fully given and had the  
benefit of the facts upon which the opinion of the witness  
was based. We do not think the ruling harmful. Similar  
questions were asked other witnesses to which similar objec-  
tions were made, so what has been said applies also to that.

The plaintiff claims title through a patent from the govern-  
ment to one MacDuff, and through a tax sale and deed; the de-

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fendant, by a grant from Congress to its predecessor for railroad purposes. In 1860, Salt Lake City was 8, 9 incorporated by an act of the territorial Legislature of Utah, and was laid out on exclusively public lands. Its corporate limits, as then established, embraced the land in question. In 1867, the limits were extended, still embracing the land. Under Sections 2387 to 2390, R. S. U. S. (Act July 1, 1870, c. 193, 16 St. L. 183), Salt Lake City was authorized to select and enter upon government lands, including the premises in question, for the use of its inhabitants; but it did not exercise that right until in November, 1871, when it made an entry and selection of over 5,700 acres, but not including the land in question. On July 21, 1869, MacDuff filed a pre-emption declaratory statement to lands including the property here in question. On June 6, 1871, the government issued a patent to him. By mesne conveyances that title was conveyed to one Joseph Morris in 1890. In 1904 the property, assessed to Morris, was sold to the plaintiff for taxes. On September 22, 1909, a deed, pursuant to the tax sale, was issued and delivered to the plaintiff, and on the 18th of that month Morris and his wife also quit-claimed to the plaintiff. Plaintiff paid all the taxes assessed against the property since 1904.

On December 15, 1870, after the MacDuff entry, but nearly six months before the patent was issued to him and about eleven months before Salt Lake City exercised its right of entry and selection, Congress granted to the Utah Central Railroad Company, for railroad purposes, "a right of way through the public lands \* \* \* 200 feet in width on each side of said railroad where it may pass through the public domain," from a point at or near Ogden City to Salt Lake City, Utah Territory. The grant required acceptance and was accepted in February, 1871, at which time the Utah Central Railroad Company filed with the Secretary of the Interior its articles of incorporation and map showing the route of its road, etc. The land in controversy is within 200 feet of the center of the railroad as constructed by the Utah Central Railroad Company in 1870 and within the route as shown by its map. My mesne conveyances and articles of consolidation

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all the right, title and interest of the Utah Central Railroad Company were conveyed to the defendant.

By act of Congress (1841), Section 2258, R. S. U. S. c. 16, 5 St. L. 455, it, among other things, was provided that "lands included within the limits of any incorporated town, or selected as the site of a city or town," and "lands actually settled and occupied for purposes of trade and business and not for agriculture," were not subject to pre-emption rights. It is stipulated that the land in controversy "has never been actually settled upon, inhabited, improved and used for public and municipal purposes, nor devoted to any public use of the Town of Sale Lake City." The lands, when MacDuff made and filed his declaratory statement in 1869, were then within the corporate limits of Salt Lake City, and because of the act just referred to were then not subject to rights of pre-emption. By reason of this, the appellant asserts the MacDuff entry and the patent thereafter issued to him in 1871 are void. To support this it relies on *Burfenning v. Chicago, St. P., etc., Ry. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, and other cases cited in its brief. That case holds that a homestead patent for lands within the corporate limits of the City of Minneapolis was invalid by reason of such provisions. The plaintiff in effect concedes that the MacDuff entry and the patent issued thereon would be invalid were it not for the act of Congress of March 3, 1877, 19 St. L. 392. By that act it is provided:

"The existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than 2,560 acres of land, or the maximum area which may be entered as a town site under existing laws, unless the entire tract claimed or incorporated as such town site shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved and used for business and municipal purposes. \* \* \* Where entries have been heretofore allowed upon lands afterward ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown \* \* \* to include only vacant unoccupied lands of the United States not settled upon or used for mu-

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nicipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects, are hereby confirmed and may be carried into patent."

The act has been held applicable to such cities as Salt Lake and other cities and towns, laid out exclusively on the public lands of the United States, and not to such cities as Minneapolis, laid out mostly on private lands, but including lands of the United States. *Houlton v. Chicago, St. P., M. & O. R. Co.*, 86 Wis. 59, 56 N. W. 336. Salt Lake City was, and it is general knowledge that other cities and towns of Utah and the West were incorporated and laid out on exclusively public lands covering rather extensive areas, thereby withdrawing the lands embraced therein from pre-emption entry and sale under the general land laws. The authorities hold that it, among other things, was intended by that act to remedy that evil and to permit pre-emption entries to be made on government lands though within the corporate limits of a city or town (*Vilas et ux. v. Algar et al.*, 109 Fed. 519, 48 C. C. A. 524; *Alger v. Hill*, 2 Wash. 344, 27 Pac. 922), and speak of it in that connection as a curative act. Thus, the further claim is made by the plaintiff that such act operated to confirm such entries as the MacDuff entry and as a ratification of the patent issued thereon. The defendant, however, asserts that Congress having granted its predecessor a present right in and to the lands in December, 1870, at a time when the MacDuff entry was of no effect and before the patent had been issued thereon, to now hold the act of 1877 as confirming or ratifying the MacDuff entry is to divest it of a vested right acquired by it before the act was passed. If the lands were included or embraced within the grant to the defendant's predecessor, then of course the subsequent act of 1877 does not affect it. Whether they were or were not so included is the decisive question. As has been seen, the defendant's predecessor was not granted any specifically described lands. It was granted a right of way through only "public lands, \* \* \* through the public domain," from a point at or near Ogden to Salt Lake City. The plaintiff claims that when that grant was made the lands here were not public lands because they then were within the corporate

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limits of Salt Lake City, and subject to selection and entry by that city.

The question as to what lands are public lands within the meaning of grants similar to that under consideration has been before the Supreme Court of the United States in a number of cases. That court, in the case of *U. P. R. R. Co. v. Harris*, 215 U. S. 386, 30 Sup. Ct. 138, 54 L. Ed. 246, said:

"The grant of the right of way was 'through the public lands.' What is meant by 'public lands' is well settled. As stated in *Newhall v. Sanger*, 92 U. S. 761 (23 L. Ed. 769): 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws'—citing *Barker v. Harvey*, 181 U. S. 481, 21 Sup. Ct. 690, 45 L. Ed. 963, and *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954.

See, also, *Bardon v. No. Pac. R. Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906; *Nelson v. No. Pac. Ry. Co.*, 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406.

Though these lands were within the corporate limits of Salt Lake City, still the ownership of them was in the government; and, until they were entered upon and selected by Salt Lake City, Congress had the undoubted right to sell and convey them. 32 Cyc. 841. And if they were in fact granted by Congress to the defendant's predecessor in December, 1870, that ends the inquiry. But here, as in the case of *U. P. R. R. v. Harris*, *supra*, the grant was a right of way only "through the public lands," which the Supreme Court of the United States said meant only such lands "as are subject to sale or other disposal under general laws." How were such lands as these, agricultural lands, subject to sale or other disposal "under general laws"? The plaintiff answers, only under the provisions of the general pre-emption laws; and, as is argued, since they were within the corporate limits of Salt Lake City, and under the provisions of the act of 1841 not subject to pre-emption rights, they therefore were not "subject to sale or other disposal under general laws," and therefore were not public lands, and hence not embraced in the grant to the defendant's predecessor. No other general laws are pointed to under which the lands were subject to sale or other dis-

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posal. The defendant does not claim they were sold or conveyed to its predecessor under any general law, but by a special act of Congress.

Plaintiff's conclusion seems plausible, and, though we were inclined to adopt it, yet we are of the opinion that the case of *Moon v. Salt Lake City*, 27 Utah 435, 76 Pac. 222, is contrary to such a holding. In that case—a case between different parties—this court, having under consideration the identical grant to the defendant's predecessor, said:

"The fact that the land in controversy was situated within the corporate limits of the city is immaterial, since it then constituted a part of the public domain."

Of course, the term "public domain" is equivalent to the term "public lands." *Barker v. Harvey, supra*. It thus was there adjudged that lands similar to these, though within the corporate limits of Salt Lake City and though not subject to pre-emption rights, were nevertheless "a part of the public domain." It, however, is argued that in the Moon Case the parties and the court assumed that the lands there were public lands; and since the judgment was affirmed the case is not a precedent as to that point, citing *Larson v. First National Bank*, 66 Neb. 595, 92 N. W. 729; *Bratsch v. People*, 195 Ill. 165, 62 N. E. 895.

It is true, as held in those cases, that, as a judgment will not be reversed for errors not presented and not argued, a decision affirming a judgment is of no controlling force in a subsequent case as to any question, though involved, but not argued or presented and left unnoticed or not passed on by the court. While the briefs on file in the Moon Case show that the question of whether the lands there were or were not public lands was not controverted nor argued, 10 yet it seems the point was not "left unnoticed" by the court. It was involved, and while there was not much said about it, and while the opinion in such respect is chiefly devoted to the question of whether the words in the grant "to Salt Lake City" refer to or embrace lands within the limits of the city, or lands only to the limits of the city, nevertheless the point here under consideration was noticed by the court and was, as we think, decided.

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Now, if that holding is in conflict with the holding of the Supreme Court of the United States, it, of course, would be our duty to follow the latter, for the question involves a federal question, the construction of acts of Congress.

11 Cyc. 752. We, however, have not been referred to 11 any decision of the Supreme Court of the United States where, as we think, the point has been directly decided by that court. It is only by analogy, and deductions from language used by that court in the cases referred to, that the claim is made that the land here, being within the corporate limits of the city and subject to entry and selection by that city, were not public lands when the grant was made to the defendant's predecessor. And until the point as to whether such lands are or are not public lands is directly decided by the Supreme Court of the United States we feel bound by the decision of this court. Hence we hold the lands here were public lands when the grant was made to the defendant's predecessor, and hence were included or embraced within that grant.

We are also of the opinion that the plaintiff has shown no title by the tax sale and deed. The property was not assessed to the defendant or its predecessor, the real 12 owner. It was assessed to Morris, who was not the owner. A sale for taxes upon such an assessment, and a deed issued in pursuance thereof, have no binding effect as against the real owner.

Our conclusion therefore is that the defendant, and not the plaintiff, at the commencement of the action and at the time of the alleged taking, was the owner and entitled to the possession of the lands in question, and therefore its motion for a directed verdict in its favor ought to have been granted; and that the court erred in rendering judgment for the plaintiff. The judgment of the court below is reversed; and since the facts respecting title to the lands are not in dispute, and since our ruling is based as it is, upon the grant by Congress to the defendant's predecessor, we see no good to be accomplished by remanding the case for a new trial. It therefore is remanded, with directions to set the judgment aside and to enter a judgment in favor of the defendant quiet-



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ing the title in it as prayed in its counterclaim. Costs to the defendant.

McCARTY, C. J., and FRICK, J., concur.

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No. 2623. Decided August 29, 1914. Rehearing Denied May 8, 1915 (148 Pac. 433).

1. DEEDS—CONVEYANCE BY FATHER TO SON—UNDUE INFLUENCE—PRESUMPTION. Where a voluntary conveyance was made by testator to his son at the instigation of the mother, the relationship between the parties gave rise to no presumption of undue influence to cast upon defendants the burden of showing the good faith of the transaction.<sup>1</sup> (Page 227.)
2. DEEDS—DEED TO SON—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE. In an action to cancel a conveyance from father to son, made at the instigation of the mother, evidence held insufficient to show her undue influence.<sup>2</sup> (Page 229.)
3. DEEDS—INCAPACITY OF GRANTOR—SUFFICIENCY OF EVIDENCE. In an action to cancel a conveyance alleged to have been made by one without capacity, evidence held insufficient to authorize finding of lack of capacity existing at time of conveyance.<sup>3</sup> (Page 230.)
4. CONTRACTS—"MENTAL CAPACITY"—STATUTE. Comp. Laws 1907, section 4001, providing that the phrases, "incompetent," "mentally incompetent," and "incapable," as used in the title (which regulates the appointment of guardians for incompetents), shall be construed to mean any person who, though not insane, is by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by designing persons, does not alter the ordinary test of contractual capacity, which

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<sup>1</sup>*Corporation of L. D. S. v. Watson*, 25 Utah, 45, 69 Pac. 531, distinguished.

<sup>2</sup>*Chadd v. Moser*, 25 Utah, 378, 71 Pac. 870; *Anderson v. Anderson*, 43 Utah, 26, 134 Pac. 553.

<sup>3</sup>*Chadd v. Moser*, 25 Utah, 378, 71 Pac. 870.

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is impairment of the mental faculties to such an extent that the subject has not power to comprehend the matter of the contract, its nature and probable consequences, and to act with discretion in relation thereto, or to the ordinary affairs of life. (Page 230.)

5. **DEEDS—DELIVERY—PRESUMPTION.** Where a deed was recorded, the grantee going into and remaining in possession, and grantor survived the making of the deed for about three and one-half years without questioning its validity or delivery, a presumption of delivery arose. (Page 231.)
6. **DEEDS—VALIDITY—UNDUE INFLUENCE—EVIDENCE.** In an action to cancel a deed alleged to have been procured by undue influence, two deeds, previously executed by the same grantor, one to another grantee, and one to the same grantee, reserving a life estate in the grantor, were properly admitted in evidence to show some reason for making the deed in question. (Page 231.)
7. **EXECUTORS AND ADMINISTRATORS—CONVEYANCE OF TESTATOR—UNDER INFLUENCE—DUTY OF EXECUTOR.** It is the duty of an executor to bring suit to cancel his testator's conveyances thought to have been procured by undue influence in order to conserve the estate. (Page 232.)

Appeal from District Court, Fourth District; Hon. A. B. Morgan, Judge.

Action by Abram C. Hatch, as executor, against Edwin D. Hatch and others.

Judgment for defendants. Plaintiff appeals.

**AFFIRMED.**

*E. A. Walton, Chase Hatch and J. W. N. Whitecotton* for appellant.

*W. W. Ray and J. L. Rawlins* for respondents.

**FRICK, J.**

Abram C. Hatch, as executor of the last will and testament of his father, Abram Hatch, deceased, brought this action to cancel two deeds by which the deceased had conveyed to the respondent Edwin D. Hatch, a son of the deceased, and a half-brother of Abram C. Hatch, certain lands alleged and

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proved to be of the value of \$6,000. The respondent Vernico Burton Hatch is the wife of Edwin, and Ruth Hatch is his mother. Ruth Hatch was the second wife of the deceased. The grounds for which the validity of the deeds is assailed are mental incapacity of the grantor and undue influence practiced upon him by Ruth Hatch, his wife. The pleadings are very long, containing many statements of evidentiary facts. The allegations of want of mental capacity and undue influence were denied, and the case was presented upon those issues.

One of the deeds was executed on the 31st day of January, 1908, by which the deceased conveyed fifteen acres to his son Edwin D. Hatch, and the other one was executed on the 1st day of June, 1908, by which he conveyed ninety acres adjoining the fifteen acres to the same son. It seems there had been two prior deeds executed by the deceased, one in 1900 and the other in 1903, one of which was made to another of his sons, a full brother of Edwin D. Hatch, and one to Edwin D., reserving a life estate, however, in the grantor, and which deeds have some bearing upon the questions involved. The deeds, and the terms thereof, are referred to by the witness Willis as will hereafter more fully appear.

It was made to appear from the evidence that both the plaintiff, Abram C. Hatch, and respondent, Ruth Hatch, were duly appointed executor and executrix of the last will of the deceased, which was executed by him on the 22d day of November, 1902, and after his death was duly admitted to probate. Abram C. Hatch, however, alone instituted this action for the reason that Ruth Hatch refused to join as a plaintiff, and therefore she was made a defendant.

The deceased departed this life on the 2d day of December, 1911, at the age of eighty-two years. He was married twice, and practically reared two families, and at his death left surviving him five children by his first wife, and five by Ruth Hatch, his second wife, who is his widow. The evidence is quite voluminous, and is principally directed to the mental condition of the deceased during the last few years of his life. We have carefully read the evidence, all of which is carefully preserved in the bill of exceptions. It is not

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practical to set forth here even a synopsis of the evidence, as to do so would make this opinion entirely too long. There is much evidence to the effect that during the last five or six years preceding his death the deceased suffered lapses of memory to the extent that in the same conversation he would ask the same question two or three times. A doctor, a grandson of the deceased, testified that his failing memory and his general mental condition was the result of a disease known as "arterial sclerosis," which, he said, caused a "hardening of the arteries," which resulted in what the doctor called attacks of epilepsy, or what are commonly called epileptic fits. It was shown that the deceased had several of such attacks, the first one along in 1906 and several more thereafter during the later years of his life. Indeed, it is contended that he suffered an attack the day or evening preceding the 1st day of June, 1908, the day the last deed in question here was executed, but from some other evidence the court was justified in entertaining some doubt with regard to that question. It was also made to appear that usually an attack would produce unconsciousness which would at times last for several hours, and that the attacks would affect the deceased's mind more or less for some time thereafter. A large number of witnesses testified with respect to the mental condition of the deceased, but we think the deductions from the facts detailed in the evidence are perhaps best reflected from the testimony of Abram C. Hatch, the plaintiff, the oldest son of the deceased, and who now is and for many years has been one of the prominent lawyers of this state and this court, and who for many years was connected in business with the deceased. In fact, their business relations continued to within a very short time before the latter's death. After the witness had stated the facts at considerable length he also stated his opinion, or made the following deductions from the facts. We copy his statements in that regard from the bill of exceptions as follows:

"There were times between 1906 and 1909 when his mind was much better than it was at other times, and I would say that at times during that period from 1906 up to 1909—up to December, 1908, I will put it—he might have been compe-

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tent to transact ordinary business with which he was acquainted, and other times for quite lengthy periods of times when he was, in my opinion, absolutely incompetent; then from on or about December, 1908, until his death there were very great differences in his condition of mind. He had these attacks. I don't know what they were. During the attacks he was unconscious, and after it was reported that he had another attack, it was considerable time before he was what I would call rational, so that he could do business at all. And from 1904—I would say the latter part of 1903—I noticed from the latter part of 1903 that he was at times unfit and incompetent to transact business, but I will say that in my judgment from 1905 he was in a condition so that any one in whom he had confidence might have over-reached him in a business transaction very well, very easily."

After a careful reading of all the statements made by this and other witnesses, I am impressed, as no doubt was the trial court, that the deductions and conclusions of the witness respecting the mental condition of the deceased at the time the deed was executed are stronger than the facts warrant.

Mr. Willis, also a lawyer, and who prepared and acknowledged the deed of June 1, 1908, was also called as a witness for the plaintiff. In view that we shall not set forth any other evidence, we shall quote somewhat freely from the evidence of this witness. It was made to appear that for twenty years or more the deceased maintained a business office in connection with his dwelling, and that much of his business was by him transacted there. It further appears that Mrs. Ruth Hatch asked Mr. Willis to prepare the deed in question and to bring it with him to the deceased's office or home and have it executed there. Mr. Willis prepared the deed, taking the description of the land from other deeds which he had theretofore prepared for the deceased, and on the morning of the 1st day of June, 1908, took it to the home of the deceased to have it executed. The witness states what transpired at that time in the following words:

"Mrs. Hatch never employed me as an attorney herself; she did employ me as attorney for Mr. Hatch. I could not say the exact date without looking at the books, but it was about

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1907. I took it that I was employed as a general attorney. I was employed to make collections and to institute suits in the courts on those collections. I prepared complaints, and Mr. Hatch signed them. Mr. Hatch appeared to know right at the time what he was at. I think that he understood what he was doing right up to the time of his death. I think that he understood transactions done through me right at the time. He had, as lots of people do, a failing of memory somewhat as people do when they grow older. I suppose he understood what he was doing when he executed those deeds, but I had reason to think otherwise from what he said afterwards. Right at the time he executed these deeds I think he knew what he was doing, and I accordingly took his acknowledgment, and I certified in that acknowledgment that he duly acknowledged to the execution of that deed. The conversation I had with him after the execution of that deed relating to the ninety-acre tract, the question of whether it included the fifteen acres or not, did not come up because that had been conveyed at a previous time. I don't think the deeds were executed at the same time. I remember two deeds. I would have to go to my books to refresh my recollection as to whether there were two deeds made at this time, but my recollection is that the deed to the fifteen acres was made some three months before. I would not be certain of the same. I made two deeds for him to what I understood to include the Priestly farm; one of them was for a fifteen-acre tract, and the other was for ninety acres. I think both tracts are called the Priestly farm. After signing the deed Mrs. Hatch went out of the room and Mr. Hatch said to me, 'Willis, what can I do for you?' And I told him that I came there to have him sign a deed, and that he had signed it. He asked me what the deed was, and what property it was for. I explained it, and he apparently understood it. Mrs. Hatch stated at that time that it was in fulfillment of arrangements made long prior to that time; she made that explanation to Mr. Hatch at the time or just prior to his signing the ninety-acre tract of land, and that prior transaction was called to his attention by her, but not the fifteen-acre tract. Mrs. Hatch explained to him prior to his signing that it was in pursuance of an agreement

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made long prior to that time, by which this farm, upon a certain contingency, was to be conveyed to Ed. I presume he understood it from her explanation. Mr. Hatch signed the deed after her explanation. I can give the substance of that explanation. It was that there had been some agreement or some understanding between Mr. Hatch and Mrs. Hatch at least, and perhaps the boys—I couldn't say as to that—that Ed. was to have certain property or certain land, and that Vermont was to have certain land, and that this Priestly farm was conveyed to Ed. in an equity proposition in the dividing up of certain lands between the boys. The question that came up was the explanation that Mrs. Hatch made to Abram Hatch as to why this deed should be signed for the ninety-acre tract. I have been acquainted with Abram Hatch all my life, and know all of his sons. I can't say of my own knowledge about his executing deeds of lands to his sons after they became of age and got married. Mr. Hatch never told me that he had conveyed lands to his other sons. That wasn't the subject of conversation at the time of the making of the Priestly farm deed. At that time Mr. Hatch asked me what he could do for me after the signing of the deed. He referred to the boys, and which boys he meant I don't know. He said he wanted the boys provided for, but there was no explanation as to who he meant. I would not like to say as to that thought being uppermost in his mind; it would be a conclusion. I would not say that he wanted the boys provided for. I don't think he told me about deeding farms to his older children."

Mr. Turner, the husband of one of the deceased's daughters by his first wife, also testified on part of the plaintiff. He said he was present at the home of the deceased on the morning of June 1, 1908, when the deed of that date was executed; that Mrs. Ruth Hatch in his presence asked the deceased to sign the deed, and he heard her tell him, "Well, you promised it to him," meaning that the deceased had promised to convey the lands described in the deed called the Priestly farm in the evidence to the respondent, Edwin D. Hatch, aforesaid. It seems the witness did not remain in the house to see the deed executed.

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The books kept by the deceased, in which he recorded his banking transactions, were produced in evidence by the plaintiff to show that during the later years of his life, and from about 1906 on, the greater part of the entries made in them were in the handwriting of Mrs. Ruth Hatch, and that there are but few entries in the handwriting of the deceased, and none after October 14, 1909. It was also shown that the deceased frequently consulted with Mrs. Ruth Hatch concerning his business affairs and transactions, and that he had great confidence in her ability and judgment. It was not shown, however, that the deceased was not directing the keeping of the books aforesaid, and that he did not finally determine for himself whether he would or would not consummate any particular business transaction or transactions.

Quite a number of witnesses testified that from their acquaintance with the habits and conduct of the deceased he was not competent to transact important business during the later years of his life, including the year 1908, without assistance from some one. Upon the other hand, there is much direct evidence, which is not questioned by any one, to the effect that during all of the years up to and including 1910, the deceased was constantly engaged in large and various business enterprises; that he was a director and vice president of a bank, and that he always discharged his official duties the same as other officials; that he was a director in a number of commercial corporations, and that he generally discharged his official duties in connection with his associates in those corporations; that in the year 1908 he made several loans, one at least for \$2,000; that he determined the character of the security for this loan, and decided for himself whether to make it or not after a personal inspection of the proposed security; that another loan of \$1,000 was made by him in the same manner, and that the note, which was produced in evidence, was in his own handwriting; that he bought and sold personal property and refused to purchase some property offered to him after examining the same; that he conducted his banking affairs, making almost daily deposits, and he either made out the deposit slips himself or directed one of the bank employees



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to do it for him, he, however, checking over the items with care; that he entered into at least one contract whereby he gave an option of purchase on some of his real estate, and when the option was taken up executed the deed therefor; that he made affidavits correcting and explaining his former official records. Indeed, it is apparent from the whole testimony that he, during 1908-10 transacted quite as much important business, perhaps more than does the average business man of his years, or some who are much younger than he was. It was also made to appear that within three days after the deed of June 1, 1908, was made he came to Salt Lake City from Heber City, his home, a distance of eighty miles or more, to perform the marriage ceremony of his grandson, Dr. Hatch. It is true that it was made to appear that he became somewhat confused in performing the marriage ceremony, in that he did not seem to remember the name of the bride, with whom he was, however, not acquainted, and in omitting to tell the young couple to join hands before commencing the ceremony, and in not remembering some other portions of the ceremony as printed in the book. He, however, completed the ceremony finally, and it would seem that if the question of the validity of the deeds had not arisen, no one would have thought the old man was mentally incompetent for the reason that he seems to have had a similar difficulty at some prior marriage ceremony. We remark, further, that most all of the witnesses directed at least the principal part of their testimony to things occurring during the last few years of the deceased's life, and after the year 1908, when the deeds were made.

It was also made to appear that the deceased was a man of very vigorous mentality, and, generally speaking, strong and healthy, and a man who always had conducted varied and large business enterprises. His two sons, the plaintiff and another son, it seems were, for many years, connected with their father in his business enterprises, and that was also true of a son-in-law, Mr. Turner. Nearly all, if not all, of the children of the first wife were thus directly engaged with their father in a number at least of his many business enter-

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prises, while the children of the second marriage were not thus engaged with him.

From the last will of the deceased it appears, however, that he bequeathed the great bulk of his property, the bequests amounting to nearly \$100,000, to Mrs. Ruth Hatch and to her five children. The remainder of the property, which the inventory shows was valued at approximately \$20,000, he divided, share and share alike, among all of his ten children.

The District Court, after hearing all of the evidence, made findings of fact in which he found the issues in favor of respondents and entered a judgment dismissing the complaint. Abram C. Hatch as executor, hereinafter called appellant, alone appeals, and asks us to reverse the findings and judgment and make findings and enter a decree according to the prayer of his complaint.

It is contended that under the evidence the findings and judgment should have been in favor of appellant. In this connection it is urged that the court erred in holding that the burden of proof was on appellant to establish the alleged undue influence practiced upon the deceased. Appellant contends that he made out a *prima facie* case of want of mental capacity and of undue influence, and therefore, by virtue of the relationship existing between the deceased and Mrs. Ruth Hatch, the burden was cast upon the respondents to show the *bona fides* and fairness of the transaction. Among the cases cited by appellant which he contends sustains the foregoing proposition respecting the burden of proof are the following: *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561; *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75; *Mors v. Peterson*, 261 Ill. 532, 104 N. E. 216; *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260; *Kennedy v. Currie*, 3 Wash. 442, 28 Pac. 1028; *Corporation of L. D. S. v. Watson*, 25 Utah 45, 69 Pac. 531; *Archer v. Archer*, 8 N. Y. St. Rep. 477; *Yosti v. Laughran*, 49 Mo. 594; *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. 430; *Paulus v. Reed*, 121 Iowa 224, 96 N. W. 757. We have carefully read all of the foregoing cases, as well as other cases cited by appellant in support of the foregoing proposition. Without pausing here to review and distinguish them, it must suffice to say that none of them, in

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our judgment, is in point or applicable to the facts of the case at bar. Indeed, wherever the rule is stated by the courts in any of the foregoing cases, it is apparent that the burden of proof to sustain a deed made by the husband or father is not cast upon the wife or a child under circumstances like those in the case at bar. This is clearly made to appear in the case of *Barnard v. Gantz*, *supra*, wherein the rule is stated on pages 256, 257, 35 N. E. 430. In *Chidester v. Turnbull*, 117 Iowa 168, 90 N. W. 583, the same question that is presented here was presented. Counsel there contended, as is contended here, that the conveyance being voluntary, the burden was cast on the grantee, the son of the grantor, to prove that the grant was the uninfluenced and voluntary act of the father. The Supreme Court of Iowa, however, stated the law to be otherwise. The rule is stated at page 170 of 117 Iowa, at page 583 of 90 N. W. in the following words:

"Counsel for plaintiffs contend that the burden is on the defendant, Thomas Turnbull, to prove that the conveyance to him by his father was not procured by means of undue influence or imposition for which the relations of the parties gave opportunity, but this is not true. We have recently held that the fact that a voluntary conveyance is made from father to son while the father is residing in the son's family, even though the conveyance deprives other children of their proportionate share in the father's property, is not presumptively fraudulent, and will not throw on the grantee the burden of proving the want of undue influence. The owner of property has a right to dispose of it during his lifetime as he sees fit, even though his act may, in itself, seem to be unfair and unreasonable with reference to the interest of other children than the one to whom the conveyance is made."

The Supreme Court of California, in the case of *In re Langford*, 108 Cal. at page 622, 41 Pac. at page 705, disposes of the contention with respect to the burden of proof as follows:

"It is sought to distinguish the case at bar from the *McDevitt Case*, 95 Cal. 17 (30 Pac. 101), because in the case at bar there was the relation of husband and wife; and the position seems to be taken that such relation raises the presumption of undue influence. But there is no such presumption. "There is no legal presumption against the validity of any provision which a husband may make in a wife's favor, for she may justly influence the making of her husband's will for her own benefit, or that of others, so long as she

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does not act fraudulently, or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent. *Latham v. Udell*, 38 Mich. 238. Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence to vitiate the will. *Hughes v. Murtha*, 32 N. J. Eq. 288. And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise a presumption of undue influence on her part. *Rankin v. Rankin*, 61 Mo. 295.' "

Apart from the evidence that Mrs. Ruth Hatch, to a large extent, made entries in the books kept by the deceased, that she was at times consulted by him and others respecting his business affairs, and that she requested the deceased to make the deed of June 1, 1908, there is no direct or indirect evidence in this record from which anyone can legitimately deduce or infer undue influence upon her part. And there is not a scintilla of evidence, it may be said, that Ed- 2  
win D. Hatch, grantee, ever even attempted to induce either the mother or the deceased to make the deed in his favor. As is intimated by the Supreme Court of California, if the courts should interfere in a transaction between husband and wife, or between those of parent and child, every time it is shown that the wife asked, or even coaxed, the husband to transfer property either to her or to one of the children of both of them, all such transactions must of necessity cease. Such, fortunately, is not the law; and the courts have frequently so declared. The following cases are all well considered, and in most of them the facts are much stronger in favor of both mental incapacity and undue influence than in the case at bar, and yet the appellate courts have either affirmed the judgments of the lower courts in sustaining the transactions, or they have reversed the lower courts where such courts have set them aside. We specially refer to the following cases, namely: *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403; *Dick v. Albers*, 243 Ill. 231, 90 N. E. 683, 134 Am. St. Rep. 369; *McLeod v. McLeod*, 145 Ala. 269, 40 South, 414, 117 Am. St. Rep. 41; *Teegarden v. Lewis*, Adm'r, 145 Ind. 98, 44 N. E. 9; *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881; *Slaughter v. McManigal*, 138 Iowa, 643, 116 N. W. 726; *Dean v. Dean*, 42 Or. 290, 70 Pac. 1039; *Blakeley v. Blakeley*, 33 N. J. Eq.

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502. See, also *Chadd v. Moser*, 25 Utah, where the present Chief Justice, at page 378, 71 Pac. 870, practically lays down the same rule. See, also, *Anderson v. Anderson*, 43 Utah, 26, 134 Pac. 553, where the rule respecting the quantum of proof necessary to establish undue influence is stated. Many more cases could be cited, but we refrain from doing so because the foregoing clearly illustrate the principle involved. In nearly all, if not all, of the foregoing cases (excepting those cited from Utah) the question of what constitutes a fiduciary relation or one of such trust and confidence as ordinarily will cast the burden of proof on the beneficiary of a particular transaction is fully discussed. It is made very clear that under circumstances like those in the case at bar there is no such fiduciary relation of trust and confidence as will cast the burden of proof upon the beneficiary under a deed or a will. The relation of parent and child or husband and wife does not, in and of itself, create any such presumption.

Nor is the evidence sufficient to authorize a finding that the deceased, at the time he made the deeds in question, was not possessed of sufficient mental capacity to make 3, 4 valid conveyances of his property. The test of mental capacity applied to contracts by practically all the courts is well stated by the Supreme Court of Indiana in *Teegarden v. Lewis, Adm'r, supra*, at page 101, in the following words:

"In ordinary contracts the test is, Were the mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life?"

In nearly all of the cases last above cited the question of mental capacity was also involved and passed on by the courts. The courts generally, as will be seen, approve of the test outlined by the Supreme Court of Indiana. This is true of this court. See *Chadd v. Moser, supra*.

Nor does Comp. Laws 1907, Section 4001, referred to by counsel for appellant, change the test. To hold that under all the facts and circumstances disclosed by the record before us the deceased did not possess the necessary mental capacity to enter into and execute ordinary contracts affecting property

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and property rights would result in laying down a rule whereby most all of the transactions of aged men and women who had some mental defects could be successfully assailed in courts of equity. No general or hard and fast rule which shall govern or control in all cases can be promulgated, but every case must, to a very large extent, be determined upon the facts and circumstances present in that case. All that we can say, therefore, is that in this case the findings and conclusions of the trial court in refusing to set aside the deeds in question upon the ground of undue influence and want of mental capacity are not only clearly sustained by the evidence, but, in our judgment, the findings and judgment are in accord with the great weight of the evidence.

It is also insisted that the deeds, or, at least the one made June 1, 1908, was not delivered. The deed, after it was signed by the deceased and his wife, was, by Mr. Willis, taken to his office, where he wrote the certificate of acknowledgment and attached his notarial seal, after which he took it back to the home of the deceased and handed it to Mrs. Ruth Hatch, one of the grantors. The deed was thereafter 5 duly recorded, and the grantee went into possession some time thereafter, and has remained in possession under the deed ever since. The deceased survived the making of the deed for about 3½ years, and transacted business, as we have seen, but never questioned the validity of the deed or the delivery thereof. Under such circumstances there arises a presumption of delivery, and under the authorities this presumption must prevail. 13 Ballard, Law of Real Property, Section 145; *Ward v. Conklin*, 232 Ill. 553, 83 N. E. 1058; *Beardslee v. Reeves*, 76 Mich. 661, 43 N. W. 677; *Jones on Evidence* (2d Ed.), Section 50.

It is further contended that the court erred in admitting the two deeds executed in 1900 and 1903, and which were referred to by the witness Willis in his testimony. These deeds were admitted for the sole purpose of showing some 6 reason or cause for making the deed of June 1, 1908. For the purpose of throwing some light upon the transaction involved here they were clearly proper. See *Beardslee v.*

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*Reeves, supra*, where a similar contention is passed on adversely to appellant's contention.

Much stress is also laid upon the fact that the deceased bequeathed about five-sixths of the property he died possessed of to his wife, Ruth Hatch, and to the five children he had by her. It is contended that this disposition is an unnatural one, and hence sheds some light upon the question of Ruth Hatch's influence over the deceased. That such a contention is unsound under facts like those in this case is clearly demonstrated by the Supreme Court of California in the case of *In re Langford, supra*. As we have pointed out, nearly all if not all, of the children of the first marriage were directly interested in and connected with the business affairs of the deceased. In such enterprises they were either partners or joint stockholders. We cannot tell what the value of such interests was. It may well be that each one of the children of the first marriage may possess as much, perhaps more, property than do those of the second marriage. The disposition made by the deceased may therefore have been just and equitable, although by the will he may have given to the children of the second marriage much more than he gave to those of the first marriage. But supposing it to be otherwise, the question was one which he alone had the right to determine, and if he did so in the full possession of all of his faculties and without being unduly influenced or coerced, his judgment in that regard, and not that of others, not excepting the courts, must prevail.

Counsel for appellant have urged upon us one or two other matters, but in view that, although we should sustain counsel in their contentions, the result would still have to be the same, it is not necessary for use to consider them.

We remark that we do not wish to be understood by anything we have said or omitted to say that this action was brought without cause. Upon the contrary, we say that, under the circumstances, if appellant thought the deeds in question were not valid, it was his duty in his representative capacity to bring an action to determine that question just as was done. What we hold is that the

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evidence in this case is wholly insufficient to warrant a court of equity to set aside the deeds or either of them.

The judgment is therefore affirmed. It is further ordered that the costs be paid out of the decedent's estate.

MCCARTY, C. J., and STRAUP, J., concur.

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BLYTH-FARCO CO. v. FREE et al.

No. 2673. Decided January 22, 1915. Rehearing Denied May 8, 1915 (148 Pac. 427).

1. **PRINCIPAL AND SURETY—BOND—LIMITATION OF SURETY'S LIABILITY.** Although where a bond is given insuring the performance of a contract both instruments should be construed together to determine the scope of the obligation assumed by the surety, nevertheless such obligation may be specifically defined and limited in the bond itself, regardless of the provisions of the contract secured. (Page 238.)
2. **PRINCIPAL AND SURETY—BOND—CONSTRUCTION.** Where the bond whereby a surety secured the performance of a contract specifically placed a limit upon such surety's undertaking, by setting out the defaults for which it should be liable, the only difference between the provisions of the contract and those of the bond being a clause that the surety should not be liable for personal injuries to any person or persons, it was clear that such clause was purposely inserted, and that the understanding and intention of the parties was that the surety be liable only for the defaults for which it specifically assumed liability in the bond, irrespective of the provisions of the contract secured. (Page 239.)
3. **PRINCIPAL AND SURETY—BOND OF SURETY COMPANY—CONSTRUCTION.** Sureties are favored by the law; but, while a surety's contract will not be extended beyond its express terms by construction, nevertheless, as against a surety company executing bonds for profit, when the intention of the parties is once ascertained, the bond will be construed neither strictly nor liberally, but so to effectuate such intention.<sup>1</sup> (Page 239.)

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<sup>1</sup>*Daly v. Old*, 35 Utah, 83, 99 Pac. 460, 28 L. R. A. (N. S.) 463;  
*Smith v. Bowman*, 32 Utah, 43, 88 Pac. 687, 9 L. R. A. (N. S.) 889.



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4. **BONDS—CONSTRUCTION.** To ascertain the intention with which a bond was executed, recourse must be had to the whole instrument, and proper effect given to every word, phrase, and sentence. (Page 239.)
5. **BONDS—CONTRACT FOR BENEFIT OF THIRD PERSON—BENEFICIARY'S RIGHT TO SUE—ACTION BY MATERIALMAN AGAINST SURETY ON CONTRACT.** A surety company executed a bond securing the performance of a contract to construct a tunnel, and providing that if the contractor should keep the terms of the contract as recited in the bond the obligation should be of no effect. A materialman sued the contractor and the surety on the former's failure to pay. The provisions of the bond were such that it did not appear to have been made for the benefit of any parties other than the corporation for which the tunnel was to be built. *Held*, that the plaintiff had no right of action against the surety, since, although the third person for whose benefit a contract was made may maintain an action thereon, nevertheless it must appear from the provisions of such contract itself that it was made for the benefit of the plaintiff, either as an individual or as a member of a contemplated class.\* (Page 242.)

Appeal from District Court, Fourth District; Hon. A. B. Morgan, Judge.

Action by the Blyth-Fargo Company against J. S. Free and others.

Judgment for plaintiff. Defendants appeal.

REVERSED AND CAUSE REMANDED, with directions to dismiss.

*King, Nibley & Farnsworth* and *T. Marioneaux* for appellants.

*Snyder & Snyder* for respondent.

FRICK, J.

The Blyth-Fargo Company, a corporation, hereafter called "respondent," commenced this action in the District Court of Wasatch County against Free & Taylor, a co-partnership,

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\**Montgomery v. Rief*, 15 Utah, 595, 50 Pac. 623; *Brown v. Markland*, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629; *Smith v. Bowman*, 32 Utah, 33-39, 88 Pac. 687, 9 L. R. A. (N. S.) 839.

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hereafter styled "contractor," and against the Guardian Casualty & Guarantee Company, hereafter called "appellant," to recover upon a bond given by said contractor as principal and appellant as surety to the Snake Creek Mining & Tunnel Company, hereafter designated "company." The bond was given pursuant to a certain contract by the terms of which said contractor agreed to construct a certain tunnel to be used for drainage and other purposes and for the construction of which respondent furnished the material sued for in this action. The respondent recovered judgment against the contractor and also against the appellant upon the bond aforesaid for the value of said material, and the latter alone appeals.

The appellant insists that the court erred in entering judgment upon the bond against it for the reason that under the terms and conditions thereof the "respondent has no right to maintain an action thereon." Upon the other hand, respondent contends that the bond was given for the benefit of all those who may have furnished labor or material to the contractor for the construction of the tunnel aforesaid. The record discloses that the contractor entered into a contract with said company to construct said tunnel, which was to be about 14,350 feet in length, and for the construction of which the contractor was to receive \$25.16 per linear foot. Under the contract and specifications, which were made a part thereof, the contractor was to furnish all the material and perform all the labor necessary to construct and complete said tunnel, and the company was to provide the power and machinery specified in the bond, which we will set forth hereafter. The specifications are made a part of the contract, and hereafter we shall refer to the contract only, although the particular provision referred to may be a part of the specifications.

It was provided in the contract that:

"The contractor shall be required to furnish a satisfactory bond in the sum of twenty thousand (\$20,000.00) dollars to insure the payment of all contracts or liabilities and expenses growing out of the construction of said tunnel under the contract, repairs, machinery, maintenance, electric energy, etc."

Also that:

“The contractor shall promptly pay all sub-contractors, materialmen, laborers and other employees as often as payments are made to it by the company, and in the event at any time of its failure so to do, the company may retain from all subsequent estimates and pay over to said sub-contractors, materialmen, laborers and other employees such sums as may from time to time be due to them respectively. Before final settlement is made between the parties hereto for work done and material furnished under this contract, and before any right of action shall accrue to the contractor against the company therefor, the said contractor shall furnish evidence satisfactory to the engineer of the company that the work covered by this contract is free and clear from all liens for labor and materials and that no claim then exists against the same for which any lien could be enforced.”

Pursuant to the contract, the appellant entered into a bond which contained the following provisions:

“Whereas, the firm of Free & Taylor, co-partnership, entered into a certain contract with specifications thereto attached and marked ‘Exhibit A,’ said specifications being made a part of said contract, with the Snake Creek Mining & Tunnel Company for the construction of the Snake Creek Drainage and Transportation Tunnel, which said contract and specifications bears date of 12th day of April, 1910, and contains the following clauses and conditions, to wit:

“Clause 8 (of specifications) General: The company will furnish:

“(a) One five-drill Sullivan air compressor and receiver, with compressor house, and the necessary electrical equipment for operating said compressor.

“(b) Electric power in quantity sufficient for use in driving the tunnel; the contractor to pay actual cost of the power consumed.

“It being understood that the company does not assume any responsibility in the furnishing of power, but simply agrees to give the contractor the benefit of its contract now in force with the Snake Creek Power Company.

“Clause 10 (of specifications) Other Provisions:

“The contractor shall be required to properly care for and

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maintain, in first-class condition, all machinery furnished by the company, and all damages thereto, other than ordinary wear, shall be paid for by the contractor.

“The contractor shall be required to furnish a satisfactory bond in the sum of twenty thousand dollars (\$20,000.00), to insure the payment of all contracts or liabilities (for which the party of the second part the ‘Company’ shall be liable, with the exception of liability on account of personal injuries to any person or persons), and expenses growing out of the construction of said tunnel under the contract, repairs, machinery, maintenance, electric energy, etc.

“Now the condition of this obligation is such that if the said Free & Taylor, a co-partnership, shall well and truly keep and perform the terms and conditions of the said contract as recited herein, on its part to be kept and performed *and shall indemnify and save harmless the said Snake Creek Mining & Tunnel Company as expressly stipulated and limited in said clauses herein recited*, then this obligation shall be of no effect, but otherwise, it shall remain in full force and effect. Provided, however, that this obligation shall in no wise be considered or be construed to be a penalty bond for failure of the said firm of Free & Taylor to perform the contract made with Snake Creek Mining & Tunnel Company on the 12th day of April, 1910, *nor shall it cover or refer to any matter or thing relating to said contract and specifications except such clauses thereof as are recited in this bond made a part thereof.*” (Italics ours.)

The clause which we have included within parenthesis is not contained in the contract, although it is incorporated into the bond. It will be observed from that portion of the bond which we have italicized that the obligations assumed by appellant are specifically limited to the provisions of the contract which are set forth in detail in the bond itself, and to no others.

The question which confronts us, therefore, is: What is the scope of the bond entered into by appellant when construed in connection with those portions of the contract which are incorporated into the bond?

Respondent contends that, where a bond is given to insure

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the performance of a certain contract, in order to determine the scope of the obligation assumed in the bond, the terms and conditions contained in both instruments 1 must be construed and considered together. This, no doubt, is sound doctrine; but it is also true that the obligation assumed by the obligor may, nevertheless, be defined and limited in the bond itself regardless of the provisions of the contract, and, if the party for whose benefit the bond is given is not satisfied with the limitation, he is not bound to accept it, but may insist upon a bond which strictly conforms to the terms of the contract. Where the obligee named in the bond, however, accepts it with all of its limitations and restrictions, he cannot, we apprehend, afterwards insist that the terms of the contract, rather than those of the bond, shall control, but he is bound by the limitations contained in the bond; and this, no doubt, is so also as against one who claims to be a beneficiary under the bond. The authority cited and relied on by the respondent, namely, 5 Cyc. 757, makes it quite clear that, although generally speaking, both the contract and bond must be construed together, yet, when the bond restricts the right to look to certain portions of the contract only, then only those which are thus selected can be considered. It is there said:

"It may be generally stated that a bond may incorporate, by reference expressly made thereto, other contracts, papers, or written instruments, or it may be conditioned for the performance of certain specific agreements set forth in such instruments, so as to embody the same therein as a part of the obligation thereof with all the stipulations, limitations, or restrictions mentioned in the referred-to papers, in which case the bond and the papers referred to should be read together and construed as a whole, although, if only specific parts of another contract be referred to, only so much of said writing is incorporated as is evident the parties intended to embody or rely upon."

If, therefore, we have recourse to the terms of the bond given in this case, it is apparent just what part of the provisions of the contract were intended to be made a part of the bond. It is unreasonable therefore to contend that, although certain portions of the contract were eliminated from the bond, yet we must still consider the whole contract for the

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purpose of determining the scope of the obligations contained in the bond. Appellant, like all others competent to contract, had the right to enter into just such a contract as it saw fit and to limit its obligations in any particular it deemed proper, and, if the company or contractor were dissatisfied with the limitations contained in the bond as executed, either, or both, could refuse to accept it. The question therefore arises: Does this bond as written authorize the respondent to maintain an action against appellant for material furnished to the contractor which was used in the construction of the tunnel?

Counsel for appellant insist that the bond in question is an indemnity bond pure and simple, and was intended to indemnify and save harmless the company for any damages it might suffer in case the contractor did not, in the particulars specified in the bond, comply with its conditions. According to the terms of the bond, it was given to "insure the payment of all contracts or liabilities *for which the party of the second part, the 'Company' shall be liable, with the exception of liability on account of personal injuries to any person or persons, and expenses growing out of the construction of said tunnel under the contract, repairs, machinery, maintenance, electric energy, etc.*" (Italics ours.) Respondent contends that, inasmuch as appellant copied a certain provision contained in the contract into the bond, it was bound to copy it correctly, or suffer the consequences. In order to avoid any difficulty in that regard, however, the court made what is termed a finding of fact wherein it found that the particular provision found in the contract respecting what the bond shall cover was "incorrectly copied in such bond" in the particular we have already indicated, and further found that it was the intention of the parties to said bond that it should insure "the payment in full of all persons who should furnish labor or materials for use in said tunnel." We remark that there are neither pleadings nor evidence to sustain any such finding. What is called a finding of fact may, however, be regarded merely as the construction which the District Court placed upon the contract and the provisions of the bond when all were construed and considered together. If therefore the court's construction is correct, appellant is

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not prejudiced by the so-called finding, although it could not be sustained as a finding of fact under the pleadings and evidence. Upon the other hand, if the construction is not the right one, respondent can gain no advantage from the fact that the court denominated what merely amounts to a legal conclusion a finding of fact. In matters of this kind we must have regard for the substance of things rather than the form in which they are stated.

We think the court's construction of the bond is too broad. It certainly cannot be questioned that appellant, like all other persons, had a right to limit and define the precise obligations it was willing to and did assume, regardless of the terms of the contract. Of course, if appellant had, merely in general terms, guaranteed the performance of the contract, then whatever was provided for therein would have to control the bond. Appellant, however, did not do this, but it, in specific terms, placed a limit upon its undertaking. Moreover, it is apparent from the instruments themselves that no mistake occurred in incorporating certain portions of the contract into the bond. So far as the contract was adopted, and undoubtedly so far as it was intended to be adopted, it was stated in the language of the contract. The only difference between the provisions contained in the contract and those found in the bond is what appellant added by inserting the clause which we have set out in parenthesis. It is clear therefore that that clause was purposely and not inadvertently or mistakenly added to the bond; and it is equally clear that it was done for the purpose of defining and limiting the scope of the obligations assumed by appellant. Taking the bond as it is written, and under the pleadings and evidence, we must arrive at the intention of the parties from the bond as written, can the respondent sustain this action? Counsel contend that in view that the appellant is engaged in the business of furnishing such bonds for profit, and for the reason that it determines upon the language and phraseology that is used therein, therefore such bonds are to be liberally construed in favor of the beneficiary. A number of cases are cited in support of the contention. While some courts use the expression that bonds given under such circumstances are to

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be liberally construed in favor of the beneficiary, yet that is not precisely what the courts mean. The rules or canons of interpretation which are resorted to by the courts to aid them in arriving at the meaning or intention of any written document, instrument, contract, or statute, are precisely the same in every case. Where, however, the intention or meaning is once ascertained, then the application of the contract to the subject-matter is in certain cases and under certain circumstances perhaps more liberal than under others. It has many times been decided that sureties are favorites of the law, and that "the contract of a surety is *strictissimi juris*, and it is not to be extended beyond the express terms in which it is expressed." *Daly v. Old*, 35 Utah 83, 99 Pac. 460, 28 L. R. A. (N. S.) 463. This is all that the courts mean when they use the somewhat loose expressions, which they sometimes do, that the contract of a surety is to be "strictly construed." Moreover, what is meant by the expression that the surety or indemnitor who executes such bond for profit does not come within the rule of strict construction is that, as against such surety or indemnitor, when the meaning or intention of the parties to such an instrument is once ascertained the bond will be applied neither strictly nor liberally, but with the view of effectuating the object or purpose for which it was given. Although a surety under such a bond is entitled to have the meaning and intention of the parties determined by the same rules that the meaning and intention of parties to other instruments are determined, yet in case of an ambiguity in the language used, or if a doubt arises by reason of the use of a particular term or phrase, the doubt may be, and usually is, resolved against the surety for profit, whereas it may be, and usually is, otherwise as against a voluntary surety. In either case, however, the surety may define and limit the scope of his obligation, and if he has done so in apt terms the court cannot legally enlarge upon them. To hold otherwise, as was said by Mr. Justice Straup in a case similar to this, "is merely an other way of saying that courts may not only enforce but also create liabilities." *Smith v. Bowman*, 32 Utah 43, 88 Pac. 687, 9 L. R. A. (N. S.) 889. To ascertain the meaning of any



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bond, we must have recourse to the whole instrument and give proper effect, if possible, to every word, phrase, or sentence contained therein. Now, if we apply the foregoing rules and principles to the bond in question, what is the scope or extent of appellant's obligation with regard to the right to maintain an action thereon by others than the company?

Respondent, among other cases, cites and relies on former decisions of this court. Those he particularly relies on from this court are *Montgomery v. Rief*, 15 Utah 495, 50 Pac. 623; *Brown v. Markland*, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629, and *Smith v. Bowman*, 32 Utah, 33-39, 88 Pac. 687, 9 L. R. A. (N. S.) 889. In *Montgomery v. Rief*, the rule is stated thus:

"Where a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon at the instance and in the name of the party to be benefited, although the \* \* \* contract was made without his knowledge, and without any consideration moving from him."

It, in that case, is, however, also said:

"To entitle a third party, who may be benefited by the performance of a contract, to sue, there must have been an intention on the part of the contracting parties to secure some direct benefit to him. \* \* \* 'To entitle him to an action,' said Mr. Justice Rapallo in *Garnsey v. Rogers*, 47 N. Y. 233 (7 Am. Rep. 440), 'the contract must have been made for his benefit. He must be the party intended to be benefited.' In *Sayward v. Dexter-Horton & Co.*, *supra*, (72 Fed. 758, 19 C. C. A. 176), it was said: 'But it is not every contract for the benefit of a third person that is enforceable by the beneficiary. \* \* \* The fact \* \* \* that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions.'"

The other two Utah cases merely approve and reaffirm the foregoing doctrine. By what is said in the foregoing quotations it is not meant that the beneficiary must be named in the contract, but what is meant is that it must appear from the terms of the contract, or, as in this case, from the bond, that its provisions were intended directly for the benefit of the person who is bringing the action, or that he belongs to a

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class which was intended to be directly benefited. The foregoing rule or principle is illustrated by the courts in a number of cases which respondent cites, and his counsel contend that the bond in question is within the rule laid down in the following, among other cases:

*Brown v. Markland*, 22 Ind. App. 652, 53 N. E. 295; *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 116 N. W. 238, 17 L. R. A. (N. S.) 906; *Gwinn v. Wright*, 42 Ind. App. 597, 86 N. E. 453; *American Surety Co., etc., v. Thorn, etc., Co.*, 9 Kan. App. 8, 57 Pac. 237; *Fitzgerald v. McClay*, 47 Neb. 816, 66 N. W. 828; *Gastonia v. Engineering Co.*, 131 N. C. 363, 42 S. E. 858; *R. Conner Co. v. Aetna Indemnity Co.*, 136 Wis. 13, 115 N. W. 811; *Pickle Marble, etc., Co. v. McClay*, 54 Neb. 661, 74 N. W. 1062; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625.

In *Brown v. Markland*, 22 Ind. App. 652, 53 N. E. 295, the Appellate Court of Indiana held that, a contract and bond containing the provisions that the contractor should furnish all labor and materials and should not suffer any "labor claims in any manner from any source whatever for work or materials furnished in said work" to remain unpaid were sufficient to entitle a materialman to sustain an action on the bond for materials furnished to the contractor which were used in the building named in the contract.

In *United States Gypsum Co. v. Gleason*, *supra*, the contract provided that the contractor must pay for all the labor and materials and give a bond to insure its performance. The bond provided that the contractor "shall pay all legal claims for labor performed and materials furnished," and the court held that a suit could be maintained by a materialman on the bond.

In *Gwinn v. Wright*, *surpa*, the bond contained the following provision:

"This bond is made for the use and benefit of all persons who may become entitled to liens under the said contract, \* \* \* and may be sued upon by them as if executed to them in proper person."

Of course, the court sustained an action by one who furnished materials to the contractor for use in the structure described in the contract.

In *American Surety Co. v. Thorn*, *supra*, the bond was to the effect that the contractor "shall well and truly pay for all labor employed and materials furnished and used in said system (waterworks) as set forth in said contract," and it was held that a materialman could sue on the bond to recover for materials furnished for said waterworks.

In *Fitzgerald v. McClay*, *supra*, the Supreme Court of Nebraska held that a materialman could sustain an action upon a bond which was given to insure compliance with the provisions of the contract in which the contractor promised to "pay off in full all laborers and materialmen for labor performed and materials furnished so that each and every person connected with this contract may receive his just dues."

In *Gastonia v. Engineering Co.*, *supra*, it was held that a materialman could maintain an action on a bond which was given to insure the performance of a contract in which it was provided that the contractor shall pay "all material used and wages of all laborers employed by said contractor."

In *R. Connors Co. v. Aetna Indemnity Co.*, it was provided that the contractor "shall pay for all labor and material that enter into the construction of the building," and it was held that such a bond was intended for the benefit of materialmen and laborers and that one coming within either class could maintain an action on the bond.

In *Pickle Marble, etc., Co. v. McClay*, *supra*, it was held that, where a bond provided that the contractor shall "satisfy all lawful claims of laborers and materialmen," one who furnished material to the contractor for use in the structure which was the subject of the contract could sue on the bond.

The other cases cited by respondent are to the same effect, and hence it is not necessary to prolong this review.

It will be observed that in each and every one of the cases reviewed there are apt and clear expressions from which it is apparent that the parties to the contracts and bonds intended them for the benefit of those who should either perform labor on or furnish materials for the building or structure which the contractor agreed to erect or construct. While the bonds, with perhaps one exception, do not in terms provide that those who perform labor or furnish materials may

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sustain an action thereon, yet the right to do that is clearly implied in all of them. In that respect the contracts and bonds in question in those cases materially differ from the bond in the case at bar. There is, however, still another and a more important difference between the bond here in question and those passed on in the cases we have reviewed. In those cases there was nothing made to appear from which it could be said that the parties to the contracts and bonds there in question intended to limit or restrict the general terms or expressions used in either. It could there be assumed that every expression, however, general, should be given full scope and effect. If therefore the contracts provided for the payment of labor and material in general terms, as is the fact in nearly all, if not all, of the cases referred to, then it could well be assumed that the parties to those contracts and bonds must have intended them to be construed so as to cover all of the provisions contained in the contracts although not incorporated into the bonds. In the case at bar, however, the only provision that was contained in the contract that the contractor shall pay "materialmen, laborers and other employees" is scrupulously excluded from the bond. That the exclusion was intentional and for a purpose cannot be doubted. Again, every general expression from which it might be inferred that the bond was intended for the benefit of particular persons or a particular class such as laborers or materialmen, is carefully guarded and limited in the bond. In that respect it is made as clear as language could well make it that the bond was intended to be limited, and was limited, by its own terms, to "indemnify and save harmless the said Snake Creek Mining & Tunnel Company as expressly stipulated and limited in said clauses herein (in the bond) recited." Further, it is expressly provided that the bond shall not "cover or refer to any matter or thing relating to said contract and specifications except such clauses thereof as are recited in this bond (and) made a part thereof." The limitations must be construed in connection with all other expressions that are contained in the bond.

While there may be general expressions, which, if construed or considered alone, might be given a wider scope or effect, yet

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when considered in connection with the express restrictions and limitations there is nothing contained in the bond which would not be proper to insert therein if given merely to indemnify against loss or damage which might be sustained by a particular corporation. This being so, we have no right to extend the scope and effect of the bond beyond what the parties thereto, from the language used by them, must have intended it should have. Nor are we permitted to have recourse to only a few general expressions in order to determine the intention of the parties. In order to arrive at the true intention of the parties, all that is said in the bond must be considered, and where the bond contains express restrictions and limitations, as is the case here, the courts have no right to look to other instruments for the purpose of extending the scope and effect of the bond. A court may give a wide scope to statements or expressions of a witness or witnesses, and in that way in a particular case may go beyond what was intended by the witnesses and yet not do any great harm nor be guilty of laying down any dangerous rules of construction. When we come to lay down rules of construction, however, and give scope and effect to the language used by the parties in written contracts or documents, all parties have the right to insist that we shall be careful in not extending the scope and effect of their language beyond what they intended it to have, and to that end they have a right to insist that the courts be bound by the usual and ordinary rules of construction. The question here is, not whether, under the circumstances, it would not be more just to permit respondent to recover on the bond; but the question is whether it was the intention of the parties to the bond that it should have the right to do so. Respondent was not obliged either to sell its material to the contractor, or in case it offered to do so, to sell them on credit. Moreover, it had the right to ascertain the precise conditions of the bond before it parted with its materials. It therefore is in no position to complain because the parties to the bond restricted and limited the conditions thereof so as not to authorize it to maintain an action thereon.

The bonds passed on in the cases cited by appellant, namely, *National Bank v. Gulf, C. & S. F. Ry. Co.*, 95 Tex. 176, 66 S.

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W. 203, and *Cleveland M. & C. Co. v. Gaspard* (Ohio), 106 N. E. 9, L. R. A. 1915A, 768, were in our judgment, fully as broad, if not broader, in their scope than is the bond in the case at bar, and yet it was held that the materialmen could not sue on the bonds. While there are a few sporadic cases, perhaps, where the courts have permitted materialmen to recover on very general terms contained in the contracts and bonds, yet we have not found a single case where a recovery was permitted in a case where the right to sue was so limited and restricted as it is in this case. Where limitations and restrictions are placed in a bond in express terms, it requires no argument to prove that rights in conflict with or in derogation of such limitations and restrictions may not be inferred and enforced. To do so would be to violate every canon of interpretation. In fairness to counsel for respondent, it should be stated that they have very frankly stated in their brief that they base their right to recover upon the construction which the trial court gave the bond. Stating their position in their own language, they say:

“We have proceeded throughout upon the theory that this bond should be construed in the light of the provisions of Clause 10 as it should be and not as it is written in the bond.”

To so construe the bond would, in our judgment, result in ignoring all the limitations and restrictions contained therein, at least so far as respondent is concerned. This would result in making a bond different from that made by the parties. We conclude therefore that the bond in question was not intended for the benefit of either laborers or materialmen, but that it was intended to exclude all from the right to sue thereon except the company for whose express benefit it was given. Had it been intended otherwise, it would have been easy to have inserted expressions in the bond evidencing that intention, and in that event the restrictions and limitations would have been omitted. Moreover, if the bond was intended for the benefit of materialmen and laborers as now contended for by respondent's counsel, the restrictions and limitations with one or two exceptions which are not material would have been entirely unnecessary and therefore useless. We must assume that they were intended for some purpose, and, if they were, then we have no right to ignore them.

In view of the conclusions reached, it is not necessary, and perhaps not proper, for us to determine the question of whether respondent has an enforceable claim against the company or not. The company is not a party to this action, and therefore anything we might decide in that regard would not be binding upon it. If, therefore, respondent has a claim against the company, it has it by virtue of our statute, and if the claim is a legal, valid and subsisting one, there is no reason why it should not enforce the same as against the company and thereafter permit the appellant and said company to adjust and settle their own controversies, and, if they cannot do so amicably, to appeal to the courts for assistance. Moreover, the question raised that respondent, if it ever had any claim against the company, has waived it, is a very important one which we would rather defer until all the parties in interest are before the court.

The judgment against the appellant is reversed, and the cause is remanded, with directions to the District Court to dismiss the complaint as against it. Costs to appellant.

McCARTY, J., concurs.

STRAUP, C. J.

I concur. In determining the meaning of a written contract, the primary factor is to ascertain the intention of the parties. That largely is to be ascertained from the language employed by them. As to sureties, their liability is not to be extended by implication beyond the terms of their contract. They have the right to stand strictly on the express terms of it and to insist that they be not held responsible for any liability or obligation not directly expressed within it. When on such consideration the intention of the parties as so expressed is once ascertained, then the contract with such ascertained intention is given effect and applied, not liberally or strictly, nor generously or niggardly, but truly completely, and conformably with such ascertained intent of the parties.

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Appeal from First District.

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## STATE v. HAMMOND.

No. 2644. Decided January 27, 1915. Rehearing Denied May 8, 1915 (148 Pac. 420).

1. **STATUTES—SUBJECTS AND TITLES—BASTARDY.** Laws of Utah 1911, c. 62, the title of which is "an act relating to bastardy and providing for security for the support of illegitimate children," does not offend against Const. art. 6, section 23, prohibiting the passage of bills containing more than one subject, which shall be expressed in its title.<sup>1</sup> (Page 251.)
2. **BASTARDS—EVIDENCE—ILLCIT INTERCOURSE.** In bastardy proceedings, it is proper to show any acts of sexual intercourse within the period of gestation.<sup>2</sup> (Page 252.)
3. **BASTARDS—EVIDENCE—ILLCIT INTERCOURSE.** In bastardy proceedings, where one or more acts of intercourse are shown to have occurred between the parties within the period of gestation, other acts of intimacy or intercourse occurring within a reasonable time before the act relied on may be shown as bearing upon the probability of intercourse at the time stated in the complaint.<sup>3</sup> (Page 253.)
4. **BASTARDS—EVIDENCE—ILLCIT INTERCOURSE.** As against a prosecutrix in bastardy proceedings, no act of sexual intercourse with others than defendant may be shown by cross-examination or otherwise, unless within the period of gestation. (Page 253.)
5. **BASTARDS—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.** Any error in admitting evidence in a bastardy proceeding will be held cured by the court's action in striking it out and directing the jury to disregard it.<sup>4</sup> (Page 254.)
6. **WITNESSES—MEMORANDUM—REFRESHING RECOLLECTIONS.** In bastardy proceedings, it was not error to permit the doctor who attended prosecutrix in childbirth to testify to the date of the birth of the child after having refreshed his memory from a memorandum book just before he was called, instead of while he was giving his testimony. (Page 254.)

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<sup>1</sup>*Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *Marionaux v. Cutler*, 32 Utah, 475, 91 Pac. 355.

<sup>2</sup>*State v. Reese*, 43 Utah, 447, 135 Pac. 270.

<sup>3</sup>*State v. Reese*, 43 Utah, 447, 135 Pac. 270.

<sup>4</sup>*Loofbourou v. Railway Co.*, 33 Utah, 434, 94 Pac. 981.



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7. **BASTARDS—EVIDENCE—CONVERSATIONS.** In bastardy proceedings evidence by the prosecutrix as to conversations between her and defendant before he was arrested concerning their friendly relations was admissible. (Page 254.)
8. **BASTARDS—EVIDENCE—LETTERS.** In bastardy proceedings, the admission in evidence of letters from defendant to prosecutrix tending to show that they were lovers was proper. (Page 254.)
9. **BASTARDS—APPEAL—PRODUCTION OF EVIDENCE—WAIVER.** In order to predicate error on the court's refusal to require the state to produce all letters written by defendant to the prosecutrix in a bastardy proceeding, it was insufficient merely to demand the letters from the state's attorney on the trial. (Page 255.)
10. **BASTARDS—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESS.** In bastardy proceedings, an instruction that the whole testimony of a witness might be disregarded if the jury believed that he had testified falsely as to a material fact was not erroneous because it failed to contain the qualifying clause, "unless the witness is corroborated by other credible evidence." (Page 255.)
11. **BASTARDS—TRIAL—VERDICT.** In a bastardy proceeding, an instruction as to the form of the verdict, "Your verdict in this case must be either guilty of having sexual intercourse with ——— (the prosecutrix), and being the father of her bastard child as charged in the information, or not guilty of having sexual intercourse with ——— (the prosecutrix) and being the father of her bastard child, as charged in the information, as your deliberation may result," was not defective as requiring the jury to find, not only that defendant was not guilty of intercourse, but that he was not the father of her child, in order to find for defendant, where it was not contended that prosecutrix had had intercourse with others than defendant." (Page 255.)
12. **BASTARDS—ORDER FOR SUPPORT—FINANCIAL ABILITY.** In bastardy proceedings, the court, before fixing the amount defendant is required to contribute to the support and education of the child, should carefully inquire into the financial standing and ability of both the father and mother, and fix such a sum as under all the circumstances may be just and reasonable, not exceeding the statutory limit. (Page 255.)

Appeal from District Court, First District; Hon. W. W. Maughan, Judge.

<sup>a</sup>*State v. Reese*, 43 Utah 447, 135 Pac. 270. <sup>b</sup>*State v. Reese*, 43 Utah 447, 135 Pac. 270.

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David Hammond was convicted of being the father of a bastard child, and was required to contribute to its support.

He appeals.

AFFIRMED.

*Geo. Q. Rich* for appellant.

*A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen.,* for the State.

FRICK, J.

The appellant was charged with being the father of a bastard child of which the prosecutrix was delivered some time before the trial, was found guilty, and was required to contribute to its education and support. From the judgment entered against him, he appeals. His counsel has argued twenty-eight separate assignments of error in his brief. We shall consider those which we deem possess at least some merit.

It is argued that the bastardly act (Chapter 62, Laws Utah 1911) offends against Article 6, Section 23 of the Constitution of this state, which provides:

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"Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

The title to the act in question reads:

"An act relating to bastardly and providing for security for the support of illegitimate children."

While this title is perhaps not the most comprehensive that could have been framed, yet it is sufficient, and fairly reflects the object or purpose of the act. This is all that is required by the constitutional provision we have just quoted. *Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *Marionaux v. Cutler*, 32 Utah 475, 91 Pac. 355. Although counsel has suggested a title, yet a mere cursory reading of the one proposed by him shows it to be no better than the one adopted by the Legislature. This assignment cannot prevail.

It is next contended that the court erred in permitting the

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State to prove two acts of sexual intercourse between the prosecutrix and appellant, one as having occurred on the 3d day of December, and the other ten days previous, to wit, on the 23d day of November preceding. The intercourse which it was alleged, resulted in pregnancy was stated 2 in the complaint as having occurred on the 3d day of December, 1911; hence it is insisted that it was error to permit the prosecutrix to testify to the one occurring on the 23d day of November preceding the 3d day of December after she had testified to the later one. The evidence was proper. Both acts were well within the period of gestation, as is shown by the record, and it is always proper to show any acts of intercourse within that period. Indeed, it has been held that, as tending to establish the probability of the act or acts of intercourse testified to as having occurred within the period of gestation, other acts of familiarity and of intercourse occurring within a reasonable time both before and after the act relied on as producing the pregnancy in question may be shown. In *People v. Jamieson*, 124 Mich. 165, 82 N. W. 835, the rule is stated thus:

“Acts of intercourse and undue familiarity both before and after the alleged act resulting in conception are admissible as bearing upon the probability of the intercourse at the time stated in the complaint.”

To this effect are *People v. Schilling*, 110 Mich. 412, 68 N. W. 233; *People v. Keefer*, 103 Mich. 83, 61 N. W. 338; *Gemmell v. State*, 16 Ind. App. 154, 43 N. E. 909; *State v. Smith*, 47 Minn. 475, 50 N. W. 605; *Baker v. State*, 69 Wis. 32, 33 N. W. 52; *Thayer v. Davis*, 38 Vt. 163; *Holcomb v. People*, 79 Ill. 409. In the last case cited it is held that the time named in the information is not material, and that any other act or acts of intercourse within the period of gestation may be shown which it is claimed may have caused the conception in question. It follows, as a matter of course, as pointed out by us in *State v. Reese*, 43 Utah, 447, 135 Pac. 270, that, unless an act of intercourse between the prosecutrix and the accused is shown to have occurred within the period of gestation, all other acts of intercourse, if any, are immaterial and improper as evidence.

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Where, however, an act, or several acts, of intercourse, are shown to have occurred between the parties within said period, then other acts of intimacy, and of intercourse, occurring within a reasonable time before the act relied on, may be shown for the purpose stated in the excerpt quoted from the Michigan case, *supra*. While in Michigan and some other states it is held that acts of intercourse occurring after impregnation takes place, as well as those occurring before, may be shown as secondary evidence, yet we think the better rule and weight of authority is to the effect that the evidence in that regard should be limited to acts of intercourse occurring a reasonable time before conception takes place. What constitutes a reasonable time in such cases is not clearly defined by the authorities. No doubt, in that regard much depends upon the relationship of the parties; that is, whether they are unmarried, are lovers, or are engaged to be married, or have been otherwise intimate. The facts of each case, to some extent at least, will furnish a basis for the admission of such evidence. Again, where the accused admits that acts of intercourse took place between him and the prosecutrix before the period of gestation, but denies any act within that period, notwithstanding the prosecutrix has testified to an act or acts occurring within that period, the courts in such cases seem more liberal in permitting evidence of acts of familiarity and intimacy. As pointed out, however, in *State v. Reese, supra*, mere isolated acts where the parties are not lovers, or are not engaged to be married, when remote, should not be admitted in evidence.

We remark, in passing this subject, that it should not be assumed that the rule of admitting such evidence applies against the prosecutrix as well as against the accused. Such is not the law. As against her, all acts of intercourse with others, if any have occurred, must be limited to the period of gestation. This is so, whether they are sought to be elicited from her on her cross-examination or are attempted to be shown by independent evidence. *Holcomb v. People, supra*; *Sang v. Beers*, 20 Neb. 374, 30 N. W. 258; *Masters v. Marsh*, 19 Neb. 458, 27 N. W. 438. What has been said also disposes of the contention that the court erred in per-

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mitting the state to show the conduct of appellant and the prosecutrix with regard to "keeping company" and in keeping up a correspondence, and otherwise.

It is further contended that error was committed in admitting certain evidence which was stricken from the record, and which the jury were instructed to disregard. We think this question is ruled by what is said in *Loofbourow v. Railway Co.*, 33 Utah 484, 94 Pac. 981, and in *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708. We are convinced that appellant suffered no prejudice by reason of what occurred at the trial, and that his rights under the circumstances were amply protected by striking the evidence objected to, and in instructing the jury to disregard it.

It is also insisted that the District Court erred in permitting the doctor who attended the prosecutrix in childbirth to testify to the date when the child was born from the fact that just before he was called to testify he had refreshed his recollection from an entry in his book in which the date of the birth of the child was recorded. No prejudice resulted to appellant from what happened in that regard. If the doctor had testified with his memorandum book in his hand at the time he could have refreshed his recollection by having recourse to the book. What was in fact done amounted to no more than that. The entry in the book, unless it constituted a public record, would not have been proper evidence as against appellant, but, in view that the doctor had made the entry in the book at or about the time of the birth of the child, he, under every rule of evidence, would have been permitted to refresh his memory, if necessary, by consulting the memorandum either before or at the time he was called to testify in the case.

It is further urged that the court erred in permitting the prosecutrix and others to testify to certain conversations which occurred between her and appellant before he was arrested concerning their friendly relations (not intercourse), and what he had said to her at the time with regard thereto. It is also insisted in that connection that the court erred in allowing in evidence certain letters written by appellant to the prosecutrix in which it was made to appear

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that the two were lovers, and had sustained relations of friendship and familiarity. All of these matters were clearly proper to be shown. 5 Cyc. 662; *Williams v. State*, 113 Ala. 58, 21 South. 463; *Walker v. State*, 92 Ind. 474; *Sullivan v. Hurley*, 147 Mass. 387, 18 N. E. 3.

It is next contended that the court erred in not requiring the state to produce all of the letters which the appellant had written to the prosecutrix. Nothing is made to appear how, if at all, these letters or any of them had any bearing upon the issues to be tried. But in any event, if counsel thought the letters material or relevant, he could have had them produced, if in existence, by complying with the statute and rules relating to the production of evidence. Merely to demand those letters from the counsel representing the state at the time of the trial is not sufficient to predicate error upon the ruling of the court which is complained of here. 9

It is also insisted that the court erred in its charge to the jury. The instructions complained of are precisely the same as those we reviewed in *State v. Reese, supra*. The two complained of are copied verbatim in 43 Utah, 447, 135 Pac. 273, 274, to which we refer the reader. It is there shown that appellant's objections are not tenable, and it is 10, 11 deemed needless to add anything to what is there said upon the subject. Nor is there any merit to the contention that the court erred either in refusing the requests offered by appellant or in charging the jury as was done in the court's principal charge.

Finally it is contended that the court erred in fixing the amount the appellant is required to contribute toward the support and education of the child in question. As intimated in *State v. Reese*, the court, before fixing the amount, should carefully inquire into the financial standing and ability of both the father and mother of the child in question, and fix such a sum as, under all the circumstances, may be just and reasonable, not exceeding the limit named 12 in the statute. It is not made to appear that the appellant is not abundantly able to pay the amount fixed by the court, nor that the amount he is required to contribute is

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not just and reasonable. In view of that we are powerless to review the court's acts in that regard.

There are several other matters assigned as error and argued in the brief, but all of those are of no special consequence, and in no way affect either the legality of the result or the fairness or impartiality of the proceedings.

A careful examination of the record reveals no reversible error. The judgment is therefore affirmed, with costs.

McCARTY, J., concurs.

STRAUP, C. J.

I concur. A witness, of course, may aid his memory by referring to a writing or entry made by him reasonably contemporaneous with the transaction. When memory is restored he may then testify to the fact. It is not essential in such case that the writing or document itself be produced. The failure to produce it goes to the weight, but not to the competency, of the testimony.

I also think it competent to show a criminal intercourse between the parties at any time it is claimed and may reasonably be presumed the bastard was conceived, whether such time is before or after the precise date alleged. And for secondary purposes, and as bearing on the question of whether such intercourse was had by them, their prior, but not subsequent, intercourses may be shown. Proof of a criminal intercourse has some corroborative value that a subsequent alleged intercourse took place, but not a prior alleged or claimed intercourse. Though there are a few cases to the contrary, yet this, I think, is the great weight of authority and the rule to which we are committed. The evidence admitted was in accordance with it.

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Appeal from Third District.

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## MILLER v. MARKS.

No. 2643. Decided December 1, 1914. Rehearing denied May 8, 1915  
(148 Pac. 412).

1. **BILLS AND NOTES—ACTION—FINDINGS OF FACT—CONCLUSIONS.** Where, in an action on a note by an indorsee, the makers relied on the defenses that the note was without consideration and was obtained by fraud, and that the indorsee took it without value, and with notice, a finding that plaintiff was an innocent purchaser for value, without knowledge of any defect in or defense to the note, and acted in good faith in the transaction, and was a holder in due course for a valuable consideration paid before maturity, was sufficient, though in the nature of conclusions.<sup>1</sup> (Page 260.)
2. **BILLS AND NOTES—BONA FIDE HOLDER—BURDEN OF PROOF.** An indorsee of a note has, on proof of defective title of the indorser, the burden of showing, as required by Comp. Laws 1907, Sections 1604, 1611, that he acquired title as a holder in due course, and took the note in good faith for value, without notice of any infirmity in the instrument or defect in the title of the indorser.<sup>2</sup> (Page 260.)
3. **APPEAL AND ERROR—RECORD—OPINION OF THE TRIAL COURT.** The opinion of the trial court, though settled in the bill of exceptions and made a part of the record, cannot be looked to to ascertain what the court found or decided, but the findings, conclusions and judgment, filed and entered must alone be looked to for that purpose, and cannot be qualified by any prior oral or written opinion of the court.<sup>3</sup> (Page 260.)
4. **APPEAL AND ERROR—RECORD—OPINION OF TRIAL COURT.** Where the opinion of the trial court is settled in the bill of exceptions, and made a part of the record, the court on appeal may look to it to ascertain the trial court's reason for its decision.<sup>4</sup> (Page 261.)

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<sup>1</sup>*Bank v. Nelson*, 38 Utah 169, 111 Pac. 907.

<sup>2</sup>*Leavitt v. Thurston*, 38 Utah 351, 113 Pac. 77.

<sup>3</sup>*Grand Cent. M. Co. v. Mammoth M. Co.*, 29 Utah 490, 83 Pac. 648;  
*Victor M. Co. v. National Bank*, 18 Utah 93, 55 Pac. 72, 72 Am. St. Rep. 767.

<sup>4</sup>*Bank v. Fox*, 44 Utah 323, 140 Pac. 660.



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5. **APPEAL AND ERROR—PRESUMPTIONS—CORRECTNESS OF RULING ON BURDEN OF PROOF.** Until the contrary is shown by the record, the court on appeal will presume that the court trying the case without a jury ruled correctly on the burden of proof, but the presumption may be overcome by anything properly settled in the bill of exceptions, and made a part of the record, including the opinion of the court. (Page 261.)
6. **APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS RULINGS ON BURDEN OF PROOF.** Where the undisputed evidence affirmatively showed that an indorsee suing on a note acquired title as a holder in due course a judgment for him will not be disturbed, though the court erroneously placed on the maker the burden of proving that plaintiff was not a holder in due course. (Page 261.)
7. **BILLS AND NOTES—BONA FIDE HOLDER—NOTICE OF INFIRMITY IN NOTE—EVIDENCE.** That an indorsee of a note for \$2,500 paid \$2,100 or \$2,300 therefor does not raise a presumption of knowledge on his part of some infirmity in the note. (Page 262.)
8. **BILLS AND NOTES—"HOLDER IN DUE COURSE"—STATUTORY PROVISIONS—EVIDENCE.** Under Comp. Laws 1907, Sections 1604, 1606, 1611, defining a "holder in due course" as one taking the instrument in good faith and for value without notice of any infirmity in the instrument or defect in the title of the indorser, and providing that when the transferee receives notice of any infirmity in the instrument or defect in the title before he has paid the full amount, he will be deemed a holder in due course only to the amount previously paid, and that every holder is deemed *prima facie* a holder in due course, an indorsee of a note who, in due course and without notice, delivered a check therefor to the indorser, but who received notice of infirmity in the note before payment of the check, which was paid when presented, acquired the note in due course, without notice. (Page 265.)
9. **BILLS AND NOTES—BONA FIDE PURCHASER—PAYMENT.** To constitute payment to protect a purchaser of a negotiable instrument, the consideration need not be in cash, but may consist of anything constituting a valid consideration of sufficient value. (Page 271.)
10. **BILLS AND NOTES—BONA FIDE PURCHASER—PAYMENT.** Where negotiable checks are exchanged for a negotiable note, each is an independent obligation and a sufficient consideration for the other, and a purchaser has made payment when the instruments are delivered, and the exchange is complete, unless the checks are not paid, nor intended to be paid. (Page 271.)

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McCARTY, C. J., dissenting.

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by *N. W. Müller* against *L. A. Marks*.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

*M. E. Wilson* for appellant.

*Booth, Lee, Badger, Rich & Parke* for respondent.

STRAUP, J.

This is an action to recover on a negotiable promissory note executed and delivered by the defendant to one Conrad, the payee, and by him indorsed and delivered to the plaintiff before maturity. The defense is that the note was given without consideration, and was obtained through fraud and misrepresentations on the part of Conrad, and that the plaintiff took it without value and with notice. The case was tried to the court, who found that the note was given without consideration, and was obtained through fraud, but found that:

"The plaintiff was an innocent purchaser for value without knowledge of any defect in or defenses to said note, and acted in good faith in said transaction, and is a holder in due course of said note for a valuable consideration paid before maturity."

Judgment was accordingly entered in favor of the plaintiff. The defendant appeals. He urges that the quoted finding is not a finding of fact, but mere statements of conclusions, and is insufficient, as to such issue, to support the judgment; that the court cast the burden of proof on him to show that the plaintiff was a purchaser with notice, and not in good faith; and that the evidence, without substantial conflict, shows that the plaintiff did not acquire title as a holder in due course.

A finding of what the plaintiff paid or gave for the note, of the ultimate facts and circumstances under which he pur-

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chased it, and what knowledge or notice, or the want of it, concerning the alleged and found defect or infirmity, was possessed by him, would have been more in compliance with the Code respecting findings. While the finding 1 complained of is more in the nature of conclusions than of fact, still we think it sufficient as to such issue to support the judgment. *Bank v. Nelson*, 38 Utah, 169, 111 Pac. 907.

In an opinion delivered by the court after a submission of the case for decision, but before findings were made, the court stated, in effect, that the burden of proof was on the defendant to show that the plaintiff purchased with notice, and not in good faith. But thereafter, and before findings, the case was reopened, reargued, and resub- 2 mitted. The opinion is settled in the bill of exceptions, and is made a part of the record. Because of what was stated therein, the defendant asserts that the court, as to that issue, erroneously cast the burden of proof on him. The rule is, as contended by the defendant, that upon proof of defective title the burden was on the plaintiff to show that he acquired title as a holder in due course, which, so far as here material, means that he took the note in good faith and for value, and that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it to him. Comp. Laws 1907, Sections 1604, 1611; *Leavitt v. Thurston*, 38 Utah, 351, 113 Pac. 77. The respondent does not dispute the proposition, but asserts there is nothing properly before us to show that the court cast such burden on the defendant, and urges that the opinion, though settled in the bill, can nevertheless not be considered by us; and though it be considered, yet the record, showing the reopening, reargument, and resubmission of the case after the opinion was delivered, and before findings, does not affirmatively show that the court so regarded the question of burden upon finally considering the evidence and making findings.

It is true, as contended, that the opinion cannot be looked to to ascertain what the court found or decided. The findings, conclusions, and judgment, as made, filed, 3 and entered, must alone be looked to for that, and can-

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not be qualified or limited by any prior oral or written opinion of the court or judge. *Grand Central M. Co. v. Mammoth M. Co.*, 29 Utah, 49, 83 Pac. 648; *Victor M. Co. v. National Bank*, 18 Utah, 93, 55 Pac. 72, 73 Am. St. Rep. 767.

But it also has been held by this court that, when an opinion, as here, is settled in the bill and made a part of the record, it is properly before us; and, while "it amounts to no judicial finding of fact, and has no judicial effect," yet it "may be looked to to ascertain the judge's reasons for his decision." *Bank v. Fox*, 44 Utah, 323, 140 Pac. 660. There are instances where a finding may have been influenced or induced by views entertained by the court as to burden of proof.

Here, after proof adduced that the title of the person negotiating the note to the plaintiff was defective, the law cast the burden on the plaintiff to show that he acquired title as a holder in due course. If the court reached the conclusion that the plaintiff was a purchaser in good faith, without notice and for value, because the defendant had not sustained the burden showing the contrary, then would the finding be influenced by an erroneous view of the law, and ought not to stand, unless the evidence, without substantial conflict, supports the finding, in which case it is immaterial what view the court took as to burden of proof. Until the contrary is made to appear, the presumption will be indulged that the court regarded the party as having the burden on whom the law cast it. It, in effect, is claimed that, to overcome the presumption, nothing but the findings can be looked to. They, in some instances, may show how the court regarded the question of burden; in others, not. Here, looking at the findings, there is nothing but the presumption to indicate how the court regarded it. In such case we think the presumption may be met or overcome by looking at anything properly settled in the bill and made a part of the record, and which tends to indicate how the question was regarded and treated. As the opinion is settled in the bill, and thus made a part of the record, we think it may be looked to for that purpose. Whether it is sufficient to overcome the presumption is another thing; since, after the opinion was

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delivered, and before findings, the case was reopened, rear-gued, and reconsidered. It, however, is unnecessary to decide that, for the finding that the note was obtained through fraud and by misrepresentations, is not assailed, and because the evidence respecting the question of whether the plaintiff was a bond fide purchaser for value without notice is substantially without conflict. Hence whether the plaintiff did or did not acquire title as a holder in due course becomes a question of law, rather than of fact; and, if the undisputed evidence affirmatively shows that the plaintiff acquired title as a holder in due course, he is entitled to prevail, though the court, as to that issue, may have mistaken the law as to burden of proof.

The evidence, without substantial conflict, shows that the plaintiff and the defendant both resided in Salt Lake City. Conrad, an agent of the Aegis Life Ins. Co., sold the defendant 100 shares of the capital stock of that com- 7  
pany at twenty-five dollars per share, in consideration of which the defendant, on the 25th day of November, 1912, gave him his promissory note for \$2,500, payable to Conrad or order at a designated bank in Salt Lake City on or before sixty days after date. The note itself recites that it was given for 100 shares of the capital stock of that company. The plaintiff for some time had been in the business of buying notes. He was not acquainted with either the defendant or Conrad. One Hemple, who was acquainted with both the plaintiff and Conrad, and knowing that the plaintiff was buying notes, informed him one evening on the street car that Conrad had the defendant's note, and gave him Conrad's address. Plaintiff, on inquiry at banks, finding that the standing, and financial ability of the defendant were good, called on Conrad on the afternoon of a Saturday, the 30th of November, and, as he testified, offered to purchase the note at a ten per cent. discount. Conrad refused to take that, but as the plaintiff testified, offered to sell for \$2,350. They then reached no agreement and parted, with the understanding that they would meet the next day to further consider the matter. The plaintiff, contemplating he might purchase the note, and not having sufficient funds at the bank with which to pay for it,

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that afternoon, after he left Conrad, arranged with his bank to borrow \$1,100 in the event he needed it, upon a note to be signed by himself and his wife, and took with him a blank note to be executed. The note was signed that afternoon, but not delivered. On the next day he again met Conrad, and then agreed to purchase the note for \$2,300, as testified to by the plaintiff, and not \$2,100, as deposed by Conrad in his deposition. That day being Sunday, nothing further was done until the next morning, December 2d, at which time they again met at about nine or nine thirty, when Conrad indorsed and delivered the note to the plaintiff. The plaintiff intended giving his check for the full amount of the purchase price, with the request that it be not presented until the next day, because, as then stated by him, he "was a little shy at the bank." But, as Conrad claimed to be in immediate need of money, the plaintiff gave him \$100 in cash, and one check for \$200 and one for \$2,000, with the request that it be not presented until the next day, when sufficient funds would be on deposit to meet it. After the exchange and delivery of the note and checks the plaintiff went to his home, prepared a notice notifying the defendant of the purchase of the note, and then went to the defendant's residence that day about 11:45 a. m., and, as he testified, read the notice to the defendant. The defendant then told him that he had signed the note, and that it was given for stock purchased by him, but stated that he would not pay it, because of fraud and misrepresentation on the part of Conrad in selling the stock. That, as testified to by the plaintiff, was the first information or knowledge he had of any infirmity in the note, or that there was any question whatever about it. No witness testified to, nor is there anything to show, the contrary. The defendant testified that no notice was shown or read to him, but that the plaintiff, between 10:30 and 11:30 on the morning of December 2d, came to his house and informed him that he had purchased the note, and asked him if he had signed it. The defendant replied, "I signed the note all right, but it was obtained under a misrepresentation, and I do not think I will pay it," and further testified that the plaintiff told him that he had purchased it at a ten per cent. discount. He,

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as he testified, then asked the plaintiff if he did not think "that was an awful discount on a note of a man that has got my standing in town, and wouldn't you naturally think there was something wrong in the first place when a man would discount a note to that extent," and that the plaintiff replied, "No," and stated that he always got ten per cent discount. The plaintiff sought Conrad at about one o'clock and told him of his interview with the defendant, and that he claimed the note was obtained by misrepresentations, and that he told him he would not pay it. Conrad replied that the defendant "was a baby; I never made a fairer or squarer deal with a man in my life than I did with that man; some man here in town went and told him he bought the stock for twenty dollars a share; now he is bellyaching about it." The plaintiff asked Conrad "to call the deal off," and stated, "While I bought the note in good faith, I would like to get out of this thing if I could do it reasonably," and spoke of stopping payment on the checks. Conrad replied: "You have got a good note. You bought it and paid for it, and the man (the defendant) will have to pay it. If you start anything like that you will get up against it. It will cost you more than it will to keep that note. \* \* \* If you undertake that (stop payment) you will be mighty sorry, for I will make it cost you more than what you get out of this thing. You have got something good now. You better stay by it and not interfere with your checks." The defendant also came up town and met the plaintiff, as he testified, between twelve and one o'clock, and said to him, "You are about as bad as the man I gave the note to," and that the plaintiff replied that he was sorry, "I looked at it that way, and said he had bought the note in good faith." The plaintiff did not stop payment on the checks. He, that afternoon, after three o'clock, completed his arrangements with the bank to borrow \$1,100, and delivered to the bank the note signed by himself and wife, and had the amount placed to his credit. The next day both checks indorsed by Conrad were by him presented at the bank and were paid, the amount charged to plaintiff's account, and the checks in due course returned to the plaintiff, marked paid. The plaintiff, to support his testimony that he had paid

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\$2,300 for the note, put the checks in evidence, and also a receipt signed by Conrad acknowledging the receipt of \$100 in cash as part payment of the note. The purchase of the note was the only transaction had between the plaintiff and Conrad. Conrad does not deny receiving both checks, or that both were indorsed and presented by him, or that he received the money on both, or that both were given for the note; nor does he deny giving the receipt for \$100 in cash, or that he received the money as evidenced by it and as part payment of the note and as recited in the receipt. The manifest and undoubted weight of the evidence shows that the plaintiff paid \$2,300 as testified to by him, and as shown by his undisputed checks and the receipt, and not but \$2,100, as deposed by Conrad, who, it seems, without explanation, deposed that was all he got for the note because that was all he accounted to his principal. So clear is the evidence as to the amount paid that a specific finding that the plaintiff had paid but \$2,100 could hardly be permitted to stand. There is as much—exactly the same—evidence that the plaintiff gave the \$200 check as part payment of the note, and that it was presented by Conrad and paid to him, as that the plaintiff gave the \$2,000 check for that purpose, and that it was presented and paid. We think it, however, immaterial whether the plaintiff paid \$2,300 or \$2,100, for neither is such an inadequate price as to raise a presumption of knowledge of some infirmity in the note.

We thus, upon the evidence, have this situation: The plaintiff, without notice of any infirmity in the note, in good faith, on the morning of December 2d, gave Conrad, in exchange for the note, two checks, one for \$200, and one for \$2,000, with the request that the latter be not presented until the next day. Both were presented the next day and paid. 8 After the exchange of the note for the checks, and before they were presented or paid, and before the \$2,000 check was to be presented as requested, the plaintiff learned of the infirmity. He then could have stopped payment on the checks before they were paid, but did not do so, and completed his arrangement with the bank to obtain sufficient funds with which to meet the payment of the checks. Upon



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these facts the defendant asserts the plaintiff did not acquire title as a holder in due course, and did not purchase in good faith for value and without notice. By our statute (Comp. Laws 1907, Section 1604), so far as material, it is provided that a holder in due course is a holder who took the instrument "in good faith and for value," and "that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it"; that (section 1606) "when the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him;" and (section 1611) that "every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." The case chiefly turns upon the question of payment. It is argued that the giving of the checks was not payment until they were presented and paid; and, since the plaintiff, before they were paid, learned of the infirmity in time to have stopped payment, he had notice before he had "paid the full amount agreed to be paid," and hence was not protected, except to the extent of the \$100 paid by him in cash. To support this the defendant relies on *Crandall v. Vickery*, 45 Barb. (N. Y.) 156, where it was held that the plaintiff there was not a purchaser in good faith for value. There checks had been given in exchange for a note with the understanding or agreement that they were not to be presented for payment, but to be returned to the plaintiff when money was wanted, and new checks to be given in lieu of them. While the first checks were outstanding, the plaintiff learned of the infirmity in the note. Thereafter the outstanding checks unpresented and unpaid were returned, and new checks given, which were presented and paid. The court, as it stated, looked beyond the mere form to the real transaction.

"Looking at it in this view," said the court, "it is seen that it was

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not contemplated by the parties, or intended, that these checks then given should ever be presented or paid. They were never, in fact, presented, and nothing was ever advanced on them. The money was paid on other checks, substituted for the first, according to the arrangement first made. At the time, therefore, when the plaintiff was fully notified of the fraud, he had only these checks outstanding, which were not to be presented, but which were to be returned to him at a future day. \* \* \* The first checks, therefore, were not intended to create an \* \* \* unconditional liability against the plaintiff. It was not expected they would be presented, or their payment enforced. The whole transaction at that time rested in this loose executory agreement, to be performed at some future time, altogether uncertain in the minds of the parties. It seems to me plain from this that nothing valuable had been parted with by the plaintiff at the time the notice was given. The real obligations upon which the money was advanced were given long afterwards, and at a time when their date and presentment and payment would afford the plaintiff no protection."

The Supreme Court of the United States, in *Dresser v. Construction Co.*, 93 U. S. 95, 23 L. Ed. 815, in referring to that case, said:

"It was held that he (the plaintiff in *Crandall v. Vickery*) was not a *bona fide* holder, for the reason that the transaction was executory when he received notice of the fraud; \* \* \* that the real obligations were given afterwards, and under circumstances that afforded no protection"

—and that the checks given before notice of the fraud were not, nor intended to be, the consideration for the note.

The reason for which the transaction in *Crandall v. Vickery* was held to be executory was not because checks had been given in exchange for the note, but because the first checks were not, nor intended to be, at any time presented or paid, but to be returned and exchanged for other checks; and, since the latter, and not the former, were the real obligations and the real consideration for the note, and since the holder, before such exchange and substitution of checks, had notice of the infirmity, he was not protected. For these reasons we think the case of *Crandall v. Vickery* not analogous to this.

Other cases are cited by the defendant to the effect that the giving of a check for a pre-existing debt, or for goods sold and delivered, does not constitute payment, if the check, on

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presentation and in due course, is dishonored or not paid, in which case the debt is not discharged or the goods sold may be reclaimed. Authorities also are cited to the effect that a purchaser of property by giving his non-negotiable note or security is not protected as a bona fide purchaser for value, if, before he actually paid the note or security, he had notice of the infirmity in the title (2 Pom. Eq. Jur. (3d Ed.), section 751), and some that he is not protected though he gave a negotiable note, unless negotiated so as to cut off defenses to the note in the hands of the original payee. *Davis v. Ward*, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29. But as to this see *Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779.

This case, as we think, rests upon different principles. True, a check, unless expressly agreed to be absolute payment, is but conditional payment; the condition being that upon presentment in due course it will be honored and paid. If it be given for a pre-existing debt, but upon presentment in due course is dishonored and not paid, of course, the debt as to the person receiving the check is not discharged. If, on the other hand, it is paid, then the debt is discharged, and payment relates back, so far as regards the extinguishment of the indebtedness, to the time when the check was given. 22 A. & R. Ency. L. (2d. Ed.) 573. The rule of conditional payment is, however, in the interest of the person receiving the check, and not of the person giving it. As to the former, it is not payment unless paid, or unless he expressly accepted it as absolute payment. As to the latter, it is payment when he delivers it, though it be dishonored and not paid, if the person receiving it chooses not to complain, or, nevertheless, to regard it as payment. If given for a pre-existing debt, and is not paid, the person receiving it may treat the indebtedness discharged and sue on the check, or he may treat the indebtedness as not discharged, and sue on the debt, or he, as affecting himself merely, may do neither, and call "things square." The law requires taxes to be paid in money; the collector may decline to receive anything but money in payment of them. If, however, he accepts a taxpayer's check, unless he takes it as absolute payment, he takes it on the condition that it, on presentment in due course, will be paid. If,

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when so presented, it is not paid, the taxes are not paid; if it is, then the taxes also are paid, and payment relates back to the time when the check was delivered. Payment in such case is equivalent to cash payment. Further, the rule also is quite well settled that an exchange of commercial paper, notes, checks, or bills is a sufficient consideration, one for the other. In such an exchange each note or check is an independent obligation not conditioned on the payment of the other, unless such condition is expressed in it; but nonpayment of the other obligation may be available as a set-off between the original parties. 7 Cyc. 710. Upon such an exchange the particular transaction between the parties is consummated, and is not executory merely; each party becoming a holder for a valuable consideration. *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46. Says Daniel in his book on Negotiable Instruments (6th Ed.) Vol. 1, section 187:

"Where one has given his own note in purchase of the note of another from the payee, notice to him by the maker not to pay his note given in purchase, and that the bought note originated in fraud, does not deprive him of the character of a *bona fide* holder for value, and he need pay no attention to such notice."

A case in point, as we think, is *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747. There Scheuerman, on the 12th day of December, gave his check to one Swaggart. It was given for a gambling debt. Matlock, who had no knowledge of that, received it from Swaggart on the 13th in exchange for his (Matlock's) check. Swaggart told him that Scheuerman had asked him "to wait two or three days" before presenting Scheuerman's check, but that he (Swaggart) needed the money. Thereupon Matlock stated he would give, and gave, his check for it. Matlock, on the morning of the 14th, presented the Scheuerman check for payment. Payment was refused, and Matlock then notified by the bank that Scheuerman had stopped payment. Swaggart did not present Matlock's check until the next day, the 15th, when, upon presentation by him, it was paid. When payment on the Scheuerman check was refused, Matlock had ample time to have stopped payment of his check before it was presented, but did nothing to ascertain whether it had

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been presented or paid; nor did he even notify Swaggart of nonpayment. He immediately gave the Scheuerman check to his attorney for collection. It was there contended that the giving of the Matlock check for the Scheuerman check was not payment until the former was paid, or had passed into the hands of an innocent purchaser for value, and, since before it was presented and paid Matlock received notice in time to have stopped payment, and having made no effort to do so, he was not a good faith purchaser for value. The court said:

"If defendant's theory is correct as to what constitutes payment, and when it took place, then Matlock received notice of an infirmity in the instrument before he paid value, and he would be bound at his own peril to stop payment of his own check. But we have already held that, where there is an exchange of commercial paper, as there was in this case, each instrument is a sufficient consideration for the other, and such exchange is an independent obligation, not conditioned on the payment of the other, unless such condition is expressed in it. It necessarily follows that the non-payment of the Scheuerman check would not be a defense to Matlock in an action against him on his own check brought by Swaggart," and would only be available by way of set-off. "As between Matlock and the bank, he could doubtless have stopped payment of his own check when denied the Scheuerman check, but that would not have relieved him of liability on his own check, either in the hands of Swaggart or of a third party as assignee. While Matlock may have had a cause of action against Swaggart, as an indorser upon due notice to him of non-payment, he is also entitled to his action against Scheuerman, and he was not bound to pursue the former for the protection of the latter, to whom he was under no legal duty on account of the original invalidity of the check."

Notice affecting the holder must exist at the time he acquires title; for then his relation to it is fixed. But, if notice is received before he pays for the paper, although the contract has been entered into, he is not on a footing of a bona fide holder without notice; if he paid a part before notice, he is protected only to that extent. Daniel (6th Ed.) Section 789a. That also is the statute. Hence the important factor here, as in the Matlock Case: "What constituted payment, and when was it made?"

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To constitute payment to protect a purchaser the consideration, of course, need not be money—cash paid. It may consist of anything constituting a valid consideration 9 of sufficient value. Giving or surrendering that is as much payment as money paid.

Where, as here, negotiable checks are exchanged for a negotiable note when each is an independent obligation and a sufficient consideration for the other, the pur- 10 chaser has made payment when the instruments are delivered and the exchange is complete, unless, as in the case of *Crandall v. Vickery, supra*, the checks were not, nor intended to be, the consideration for the note, or unless, as in that case, the real transaction constituted nothing more than a mere executory agreement or promise to pay at some future time. Of course, as to Conrad receiving the checks, they were not payment until paid, unless expressly accepted as absolute payment. But when paid, payment, even as to him, related back to the time when the checks were delivered. Upon such an unconditional and completed exchange the transaction is consummated upon the delivery of the papers, and the rights and obligations of the parties fixed, which cannot be affected by any subsequent notice.

Much is made of the request that the \$2,000 check be not presented on the day it was delivered, but on the next day. From that it is argued that the real transaction shows a mere promise or agreement to pay in the future. The fact is relevant to consideration and good faith; but the conclusion is not maintainable. The transaction has no element of a mere offer, promise, or of a mere executory agreement to pay in the future. As said in the *Matlock Case, supra*:

The request "was not binding on the payee. It did not vary the terms of the writing. It added nothing to it and took nothing from it that was essential to its character as a negotiable instrument. From such a request one would usually and rightly infer that the maker had not funds on deposit to meet the check when issued, but would deposit sufficient funds within the time, and, by the use of such language, notice of that fact might be given; but it is not calculated to carry notice of any infirmity in the contract."

We are of the opinion that the plaintiff acquired title as a

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holder in due course, and therefore the judgment should be affirmed.

Such is the order; costs to respondent.

FRICK, J.

I concur. At the time of the argument, and before a careful and thorough examination of the authorities, I was strongly inclined to the opinion that the mere giving of the checks by the respondent did not constitute payment for the note in question. The authorities, however, do not support that opinion. The cases that must control here, as pointed out by Mr. Justice STRAUP in the prevailing opinion, are clearly to the effect that, where one person issues his negotiable check in exchange for negotiable paper, such check, for the purpose of protecting the purchaser, constitutes payment for such paper; and if the check be given in good faith before maturity of the paper, and without notice of any infirmity therein, the giver of the check, ordinarily at least, is a holder in due course, and may enforce payment of the paper, although he may receive notice of some infirmity therein before the check is actually paid by the bank or person on whom it is drawn. The courts make a clear distinction between transactions relating to the purchase of commercial paper and those relating to property generally, whether real or personal, and it would be futile to attempt to explain away the distinction. Nor is it of any consequence that, in my judgment, there should be no such distinction. It is my duty to declare the law as I find it, and not as I should like to have it. As was said by an eminent jurist in *Stack v. N. Y., etc., Railroad*, 177 Mass. 158, 58 N. E. 687, 52 L. R. A. 328, 83 Am. St. Rep. 269, so may it still be said:

"No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain."

This is especially true of appellate judges. My conviction and judgment, therefore, are important only where there is a diversity of opinion as to the law or facts, or in applying the conceded or found facts to the law. When the authorities

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have spoken, therefore, it is as much my duty to follow and abide by them as it is the duty of any citizen. Moreover, in Oregon the same negotiable instruments act is in force which is in force in this jurisdiction. One of the principal objects in view in adopting that act by the several states was to bring about uniformity in the law relating to negotiable instruments. Where that law has been construed, therefore, by a court of competent jurisdiction, I conceive it my duty to follow such construction. If the constructions placed upon the law are not uniform, the law will cease to be so, and the principal purpose for which it was enacted fails. For the reasons so ably stated by Mr. Justice STRAUP, which I need not refer to nor repeat here, the judgment should be affirmed.

McCARTY, C. J.

I dissent. Comp. Laws 1907, section 1606, provides:

“When the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course *only to the extent of the amount theretofore paid by him.*” (Italics mine.)

When Miller learned of the infirmity in the note, namely, that it had been obtained by Conrad from Marks by fraud, he had paid but \$100 on the purchase price of the note. Now, if the foregoing section of the statute means what it says—and I submit that it does—Miller is entitled to recover “only to the extent of the amount” paid by him before he had notice of the fraud by which Conrad procured the execution of the note by Marks. Miller, at the time he delivered his two checks to Conrad, did not have sufficient funds in the bank on which they were drawn to pay them. It was agreed between them that the checks would not be presented to the bank for payment until the following day, and that in the meantime Miller would make provision to have sufficient funds in the bank to pay the checks when presented. I have not been cited to, nor have I been able to find, an authority that holds that the giving and acceptance of a check under such circumstances is a completed transaction and unconditional payment of the



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property received therefor. It would, however, be a work of supererogation to cite the numerous authorities that sustain a contrary position. Miller received notice—had actual knowledge—two hours after he delivered the check to Conrad that the transaction in which Conrad obtained the note was impregnated with fraud. At the time Miller received notice of the fraud, as stated, he had paid but \$100 on the purchase price of the note. His checks held by Conrad had not been, and would not be paid until the following day. Miller, therefore, had ample time and opportunity to protect himself before the checks were presented to the bank for payment. The payments made by Miller on the purchase price after he received notice of the fraud were made under circumstances which, under the great weight of authority, afford him no protection. A question similar to the one under consideration was involved in the case of *Dresser v. Missouri, etc., R. R. Const. Co.*, 93 U. S. 92, 23 L. Ed. 815. That was an action to recover on three promissory notes the aggregate amount of which was \$10,000. The defense interposed was that the notes were obtained by fraud. The plaintiff claimed to have purchased the notes under an oral agreement and that the money should be paid therefor as required. He paid \$500 on the purchase price before he received notice of the fraud. The trial court instructed the jury that:

“If the fact of fraud be established, and the jury find from the evidence that the plaintiff paid \$500 upon the notes without notice of the fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only *pro tanto*; that is, to the amount he paid before he received notice.”

This instruction was approved by the Supreme Court on appeal. In the course of the opinion the court says:

“The notes in question were purchased upon an unexecuted contract, upon which \$500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consent-

## Appeal from Third District.

*ing party.* One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts generally. \* \* \* The plaintiff here occupies the same position as the *bona fide* purchaser of the first of a series of notes, of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no farther. Upon receiving notice of the fraud, his duty was to refuse further payment; and the facts before us required such refusal by him. \* \* \* The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not, within the principle which protects a *bona fide* purchaser. No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any." (Italics mine.)

The court cites with approval the case of *Crandall v. Vickery*, 45 Barb. (N. Y.) 156 (this case is also cited and briefly discussed by Mr. Justice STRAUP in the foregoing prevailing opinion), and says:

"That case is stronger for the holder than the case before us, in the fact that the checks were there given on the original transaction, *which might have been presented or passed off* to the prejudice of the maker." (Italics mine.)

So in this case Conrad might have "presented or passed off the checks to the prejudice of the maker" immediately after he received them; but he did not do so. If a third party had purchased the checks from Conrad in good faith without any knowledge of the fraud, a question quite different from the one before us would be presented. This case and the *Crandall Case*, I think, in principle are identical. The contract in each case was, at the time the maker of the checks received notice of the fraud, executory. In some respects *Crandall v. Vickery* is a stronger case for the holder than is the case at bar. In that case the drawer had sufficient funds in the bank to pay the checks first issued, and doubtless the checks would have been paid if they had been presented, in which case *Crandall* would have been a *bona fide* holder. In this case Miller, when he delivered the checks to Conrad, did not have sufficient funds in the bank to meet them. It appears that the amount of the checks exceeded his credit at the bank \$1,100. There

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is no assurance whatever that the check for \$2,000 would have been cashed by the bank if it had been presented before the \$1,100 was deposited by Miller to the credit of his account; and I think, under the circumstances, the presumption may be fairly indulged that the bank would not have honored the larger of the two checks if it had been presented on the day it was issued.

I am clearly of the opinion that, under the circumstances, good conscience and fair dealing required of Miller, when he learned of the fraud, to notify the bank not to pay either of the checks. Having failed to do this, he ought not to be permitted to recover from Marks any sum of money in excess of the \$100, with interest thereon, that he paid before he received notice of the fraud.

The case is clearly distinguishable from the case of *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747. In that case it does not appear that Matlock ever learned that the Scheuerman check was given for a gambling debt until the filing of the answer in which it was alleged that the consideration for the check was a gambling debt.

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Appeal from Fourth District.

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## DAYTON v. FREE et al.

No. 2648. Decided Dec. 1, 1914. Rehearing denied May 8, 1915 (148 Pac. 408).

1. **EXCEPTIONS, BILL OF—EXTENSION OF TIME FOR SETTLING—NECESSITY OF SHOWING EXTENSION IN BILL.** Under Comp. Laws 1907, Section 3197, as amended by Laws 1911, c. 94, specifying the papers constituting the judgment roll, and not including orders extending the time to serve and settle a bill of exceptions, such orders must be incorporated and settled in the bill of exceptions, or the bill will be disregarded as not served or settled in time, as the court is authorized to notice only that which is part of the judgment roll or properly settled in the bill of exceptions, which, when filed, becomes a part of the judgment roll. (Page 280.)
2. **APPEAL AND ERROR—WAIVER OF ERRORS BY FAILURE TO URGE.** An assignment, complaining of the overruling of the demurrer to the complaint, was abandoned by appellants, where it was not argued nor referred to either in the briefs or on the oral argument. (Page 281.)
3. **APPEAL AND ERROR—ASSIGNMENTS OF ERROR—ERRORS REVIEWABLE WITHOUT AN ASSIGNMENT.** Being jurisdictional, the court may notice the complaint to ascertain its sufficiency to support the judgment, though the assignment complaining of the overruling of a demurrer thereto has been abandoned. (Page 281.)
4. **MASTER AND SERVANT—LIABILITY FOR INJURIES—NEGLIGENCE OF "INDEPENDENT CONTRACTORS."** Plaintiff's employers contracted with a mining company to construct a tunnel in accordance with certain specifications, the company reserving the right to terminate the contract. The contractors agreed to employ no person on the work not satisfactory to the company or its agent, to furnish the company a full list of all employees, and to promptly discharge any employee at the request of the company for reasonable and sufficient cause. The specifications made provision for laying a track, air, and ventilating pipes and timbering the tunnel, the timbers, track and pipes to be placed as designated by the company's engineer. The company was to furnish an electrical apparatus for the work and a boarding house and office buildings. It reserved the right to carry on mining operations through the tunnel, not interfering with

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<sup>1</sup>*Callahan v. Salt Lake City*, 41 Utah 300, 125 Pac. 863.

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the work by the contractors, and to order additional work to be done, or to make changes. The contractors were to promptly pay sub-contractors, material men and employees, and upon their failure so to do the company was given the right to retain a sufficient amount to pay them from payments due the contractors. Imperfect or insufficient work or material, when pointed out by the company's engineer, was to be immediately remedied and made good and sufficient by the contractors. *Held*, that the company having neither reserved nor exercised the right to superintend, direct or control the work with reference to the methods of procedure or means by which the result of the work was to be accomplished, plaintiff's employers were independent contractors for whose negligence the company was not liable.<sup>1</sup> (Page 281.)

5. MASTER AND SERVANT—LIABILITY FOR INJURIES—NEGLIGENCE OF INDEPENDENT CONTRACTORS. Where independent contractors were employed by a mining company to construct a tunnel, the company was not liable to an employee of the contractors injured by the discharge of a "missed hole" due to the negligence of the contractors in failing to notify or warn him or to promulgate rules to prevent such an injury, as the employer of an independent contractor is only liable where the injury is the direct result of the stipulated work, where the work is intrinsically dangerous and the injury is a consequence of the failure of the contractor to take appropriate precautions, or where the injury is caused by the non-performance of an absolute duty owed by the employer to the injured person, or to the class of persons to which he belongs, and the injury resulted from the manner of performing the work, over which the company neither reserved nor exercised direction, control or supervision, and not from the act of performance itself, and the company owed the employee no duty to provide a safe place to work, or to warn or notify him of missed holes, or to guard him against dangers incident to or created by the prosecution of the work. (Page 285.)

Appeal from District Court, Fourth District; Hon. A. B. Morgan, Judge.

Action by Ernest Dayton against J. S. Free and others.

Judgment for plaintiff. Defendants other than the Snake Creek Mining & Tunnel Company appeal.

Judgment in favor of such company. Plaintiff appeals.

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Appeal from Fourth District.

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AFFIRMED.

A. C. Hatch and E. A. Walton for Dayton.

Howat, Macmillan & Nebeker for Snake Creek M. & T. Co.

King & Nibley and P. T. Farnsworth, Jr., for Free & Taylor.

J. E. Johnson for Stewart and other defendants appellants.

STRAUP, J.

The plaintiff brought this action against the Snake Creek Mining & Tunnel Company, a corporation, Free & Taylor, partners, and six others, Stewart *et al.*, partners, to recover damages sustained by him whilst he, as he alleges, was in the employ of all of them working underground in a tunnel, engaged in drilling and blasting. He was injured by the discharge of a "missed hole" at the face of the tunnel, left by a previous and an outgoing shift. The alleged negligence is that the defendants failed and neglected to notify or warn him of the missed hole, by reason of which he was injured while he and others, without knowledge of the missed hole, were drilling holes at the face of the tunnel. All of the defendants denied the alleged negligence, pleaded assumption of risk, contributory negligence, and negligence of fellow servants. The company further pleaded that it let the construction of the tunnel to Free & Taylor as independent contractors; that the plaintiff was not in its employ, but in the employ of Free & Taylor, or Stewart *et al.*, and that it had not charge of, and had not directed or controlled, the work. Free & Taylor averred that they sublet the work to Stewart *et al.* as independent sub-contractors, who employed the plaintiff and other workmen and who had the sole direction and control of the operations and of the work. The case was tried to the court and a jury. The court directed a verdict in favor of the company, and submitted the case to the jury as to the defendants Free & Taylor and Stewart *et al.* A verdict was rendered, and a judgment entered against all of them in favor of the plaintiff. From that judgment Free & Taylor appeal, and claim that Stewart *et al.* joined in the appeal. The plaintiff also appeals from the judgment in favor of the company.

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He moves to dismiss the appeal from the judgment in his favor on the grounds that Stewart *et al.* were not properly made parties to that appeal, and that it was not taken in time. He also moves to strike the bill of exceptions on the ground that it was not served or settled in time. The company, Free & Taylor and Stewart *et al.*, in the court below, were each represented by separate and different 1 counsel. Counsel for Free & Taylor, in the notice of appeal appealing from the judgment in favor of the plaintiff, named all of the defendants, except the company, as defendants appealing, and signed the notice in their name and in the name of the attorney who, in the court below, represented Stewart *et al.*, as "attorneys for said defendants." The plaintiff claims, and supports the claim by affidavits, that the attorney for Stewart *et al.*, after verdict and judgment, and on the record, and upon service of notice, withdrew from the case, and no longer represented Stewart *et al.*; and that counsel for Free & Taylor had not represented Stewart *et al.* and disclaimed representing them, and had no authority to appear for or represent them in taking or prosecuting the appeal, nor to sign the name of their former counsel to the notice of appeal, and hence demanded that they be required to show authority in such particular. Counter affidavits were filed to support such authority. It is questionable whether sufficient authority as to all of the defendants, Stewart *et al.*, is shown. And it is also questionable whether the record affirmatively shows, as it is required to show, that the appeal was taken in time. We, however, have concluded to treat the appeal good as to parties and time. But we are of the opinion that the motion to strike or disregard the bill of exceptions as to all of these appellants must prevail. In the first place, no bill at all as to defendants Stewart *et al.* was served or settled. So, as to them, there is no pretense of a bill. There is a purported bill as to Free & Taylor. The judgment from which they appeal was entered on the 16th of August, 1913. There are purported orders attached to the transcript, showing an extension of time to serve and settle a bill to and including January 10 1914. They are not in-

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corporated, nor in any manner referred to, in the bill, and are not a part of it. If we, nevertheless, are authorized to notice them, the bill was served and settled in time; otherwise not. Our statute (Comp. Laws 1907, Section 3197) as amended by Chapter 94, Laws 1911, provides what orders are of the judgment roll without a bill. Such as these are not included. To be noticed they, therefore, must be settled in the bill. But that was not done, nor is there any reference whatever made in the bill concerning them. We are authorized to notice only that which is of the judgment roll, or properly settled in the bill which, when filed, becomes a part of the judgment roll. Thus, on the face of the record, it appears that the bill was not served or settled in time; hence, as to these appellants, must be stricken or disregarded.

The only reviewable assignment presented by them, without a bill, relates to the overruling of their demurrer to the complaint. But that assignment was not argued nor referred to, either in the briefs or on oral argument. So **2, 3** for as appellants may abandon it, it is abandoned. Being jurisdictional, however, we may notice the complaint to ascertain its sufficiency to support the judgment. To that extent we look at it, and to that extent we hold it good. Since nothing is claimed for this assignment, we need say no more about it. The judgment appealed from in favor of the plaintiff is therefore affirmed, and his costs, as to these appellants, awarded to him.

Now, as to plaintiff's appeal from the judgment entered against him in favor of the company. As to these parties, plaintiff's appeal and bill are within time, his motion for new trial having been overruled March 28, 1914, and his appeal taken April 13, 1914. The assignment presents **4** a review of the ruling directing a verdict in the company's favor. It was made on the theory that the work of digging and running the tunnel was let by the company to Free & Taylor, independent contractors, who, or Stewart *et al.*, sub-contractors, controlled and directed the work, furnished all material, employed all laborers and employees, including the plaintiff, and controlled and directed them. The material facts relating to such issue as between the plaintiff and the



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company are: The company, to develop mining claims in which it was interested, let a written contract to Free & Taylor, contractors (referred to in the contract as "the contractor"), to construct a tunnel 14,350 feet long, nine feet high, and six and one-half feet wide. By the terms of the contract they were required to provide all material and perform all work as specified in "specifications" attached to the contract and made a part of it. The company agreed to pay them \$25.16 for each linear foot of tunnel driven in accordance with the specifications. If they failed or refused for six months to do the amount of work stipulated in the specifications—work equivalent to 300 feet each month—or if the company had not sufficient funds to justify a continuance of the work, the company reserved the right to terminate the contract. But in the event it terminated it without fault on the part of the contractors, it was to pay them for all work completed, and to purchase from them at cost all machinery, appliances, tools, material, etc., on hand. The company agreed to furnish necessary dump ground, easements, and rights of way. It was further stipulated in the contract (Article 6) that:

"The contractor agrees that he will employ no person on the work, or in or about the premises herein referred to, unless such persons are satisfactory to the company or its agent, and further agrees to furnish said company, when requested, with a full list of all men employed by him, and that he will promptly discharge any man so employed, at the request of said company, in case a reasonable and sufficient cause is assigned therefor."

In the specifications are specified the objects, extension, and dimensions of the tunnel, provisions made for laying a track, air, and ventilating pipes, and timbering the tunnel, which timbers, track and pipes were to be placed and laid as designated by the company's engineer. The company was required to furnish "one five-drill Sullivan air compressor and receiver, with compressor house, and the necessary electrical equipment for operating said compressor, electric power in quantity sufficient for use in driving the tunnel, the contractor to pay actual cost of power consumed," and a "boarding

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house and office buildings not to exceed the cost of \$3,000." Other specifications are made regarding estimates and payments to be made every month, but providing for ten per cent. deduction of payments until the completion of the tunnel to the satisfaction of the company's engineer, the use and care of the machinery furnished by the company and interruptions resulting from strikes, etc. The company reserved the right, "at any time during the prosecution and continuance of the work, to run drifts, cross-cuts, tunnels, upraises, and winzes, and to conduct and carry on such other mining operations through and from the said tunnel as it might desire," but which would not interfere with the reasonable prosecution of the work by the contractors. The company also reserved the right "at any time either before or during the construction of the work, or any portion thereof, to order any additional work to be done and to make any changes in the work contracted for, or in its location or position either in line or grade which it may deem expedient or which the engineer of the company may direct," but in the event of making such additions or changes it was required to pay the contractors for all extra work and expenses. It is also specified that the contractors were to promptly pay "the sub-contractors, materialmen, laborers and other employees as often as payments are made to it (them) by the company," and upon their failure so to do the company was given the right to retain from subsequent estimates a sufficient amount to pay the same. It is further provided that "all imperfect or insufficient work or material, when pointed out by the engineer of the company, shall be immediately remedied and made good and sufficient by the contractor at his own cost and expense to the satisfaction of said engineer"; and before final settlement, the contractors were required to furnish evidence satisfactory to the engineer that "the work covered by this contract is free and clear from all liens for labor and materials and that no claim then exists against the same for which any lien could be enforced." It was further provided that the contract was not to become binding until the contractors furnished a satisfactory bond in the sum of \$20,000 to insure payment of all contracts, liabilities, and expenses

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growing out of the construction of the tunnel under the contract, etc., and to indemnify and hold the company harmless.

Nothing is contained in the contract or specifications by which the company reserved or retained the right to direct or control the prosecution of the work, to employ, control, or direct any of the employees or workmen, except as contained in Article 6. Nor is there any evidence to show that the company in fact directed, controlled, or superintended the prosecution of the work, or hired or discharged employees, or directed, controlled, or superintended them in and about the work, except the engineer furnished the course and grade of the tunnel, designated the places requiring timbering, and designated the places where the track and pipe were to be laid, and at places required widening of the tunnel and extra work to be done to support the roof of the tunnel with reinforced concrete. Because of these, and because the defendant reserved the right to enter the tunnel, to run drifts, crosscuts, etc., as hereinbefore stated; because the contractors were not to employ any one not satisfactory to the company and to discharge any employee at its request upon reasonable and sufficient cause, as stated in Article 6; the provision in the contract relating to its termination, and if terminated without fault on the part of the contractors the company to purchase at cost all machinery, material, etc., on hand, the contractors to indemnify the company in respect to liability growing out of the construction of the tunnel; and of the provision giving the company the right to order additional work and to make changes as heretofore stated—the claim is made that the relation between the company and the contractors was not that of independent, but non-independent, contractors. We do not think the claim tenable. To support it the plaintiff cites and relies on 1 Thompson Neg. 659-661; 1 Bailey Personal Injuries, p. 108; *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45; 1 Shear. & Redf. Neg. (4th Ed.) 164; Moll, Ind. Contr., pp. 48, 63; *Harmon v. Contracting Co.*, 159 N. C. 22, 74 S. E. 632; *Quayle v. Sewerage & Water Board*, 131 La. 26, 58 South. 1021; *Atlantic Trans. Co. v. Coneys*, 82 Fed. 177, 28 C. C. A. 388. We do not think the cited authorities uphold him. They relate to instances and cases where the proprietor or employer

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reserved or exercised the right to superintendent, direct or control the work, not only with respect to results, but also with reference to methods of procedure or means by which the result was to be accomplished, where the will and discretion of the contractor as to the time and manner of doing the work or the means and methods of accomplishing the results were subordinate and subject to that of the owner or proprietor. We do not find anything in the contract or the evidence which brings this case within such a rule. The things pointed to, in our judgment, do not justify a finding that the company reserved the right to direct, control, or superintend the work, or that it in fact directed or controlled the time or manner of doing it, or the means and methods by which the results were to be accomplished. The thing most nearly approaching that is Article 6 of the contract; but when it is considered in connection with the whole of the contract no such direction or control is fairly deducible. The case, as we think, is analogous to that of *Callahan v. Salt Lake City*, 41 Utah 300, 125 Pac. 863, where it was held that the relation of independent contractor existed.

The further claim is made that the company could not, by an independent contract, relieve itself from 5 liabilities for injuries such as the plaintiff sustained because of the inherent danger of the work. The rule as to that is stated in 1 Labatt's Mast. & Serv., Section 41, thus:

"The general rule that the employer of an independent contractor is not liable for an injury resulting to a third person from a tortious act committed by himself or his servants is subject to three exceptions, viz.: (1) Where the injury was the direct result of the stipulated work; (2) where the work was intrinsically dangerous, and the injury was a consequence of the failure of the contractor to take appropriate precautions; (3) where the injury was caused by the non-performance of an absolute duty owed by the employer to the complainant, individually or to the class of persons to which he belongs."

In 26 Cyc. 1557:

"Where the act which causes the injury is one which the contractor was employed to do, and the injury results, not from the manner of doing the work, but from the doing of it at all, the employer is liable for the acts of his independent contractor. So

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where the work which the contractor is employed to do is wrongful in itself, or if done in the ordinary manner would result in a nuisance, the contractee is liable for injury resulting to third persons, although the work is done by an independent contractor. For instance, where the work involves the commission of a trespass, or where a trespass is committed by the advice or direction of the contractee, he cannot escape liability because the work was done by an independent contractor. \* \* \* Another exception to the general rule, closely related to the one just considered, is that where the work is dangerous of itself, or, as often termed, is 'inherently' or 'intrinsically' dangerous, unless proper precautions are taken, liability cannot be evaded by employing an independent contractor to do the work. Stated in another way, where injuries to third persons must be expected to arise unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief. The injury need not be a necessary result of the work; but the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken."

The proposition is well put in 1 Thomp. Com. Neg. Section 646:

"As well stated in recent cases in New York, there are but three cases in which the owner of fixed property is responsible for acts done upon it which result in injury to another: First, where the person doing the act stands toward the proprietor in the relation of employee or servant; second, where the act is authorized by a contract between the proprietor and actor necessarily produced the injury; and, third, where the injury was occasioned by the omission of some duty imposed on the proprietor."

Other cases are cited by the plaintiff to the same effect. The rule as thus stated is conceded; but we do not think the case falls within it. *State v. General Stevedoring Co.* (D. C.), 213 Fed. 51; *Samuelson v. Cleveland Im. Co.*, 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456; *Bibb's Adm'r v. Norfolk & W. R. Co.*, 87 Va. 711, 14 S. E. 163; *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 Pac. 82, 14 L. R. A. (N. S.) 913, 14 Ann. Cas. 1159; *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310. The injury here was not the direct result of the stipulated work, but from the manner of doing it—from the failure or negligence of some one to warn the plaintiff of the missed hole or to establish and promulgate rules giving notice

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of such fact. Nor was the injury caused by the non-performance of a duty owing by the company to the plaintiff. He was directly employed by Free & Taylor, or Stewart *et al.*, and not by the company. Nor was he subject to its direction or control. And, as has been seen it having neither reserved nor exercised direction or control over the work, or the time or manner of doing it, it owed him no duty to provide a safe place to work, or to warn or notify him of missed holes, or to guard him against dangers incident to or created by the prosecution of the work, and certainly not to guard or protect him against the negligence of those who had employed him or with whom he labored. But it is said developing a tunnel by underground blasting is dangerous. Dangerous to whom? Here, only to those engaged in and about the work. So is feeding a threshing machine or working at sawmilling dangerous. An inexperienced employee, unguarded against attendant dangers and attempting such work, may probably be injured. Who, if any one, owes him duties of warning and protection? He who employed or directed or controlled him, or directed or controlled the threshing or sawing. Certainly not the farmer, who did no more than merely contract with the thresher to thresh his grain, or with the sawmiller to saw his timber. Further, and as stated by Chief Justice Cockburn, in *Bower v. Peate*, 1 Q. D. Div. 321:

"There is an obvious difference between committing work to the contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

Here the stipulated work itself, constructing and developing the tunnel, did not involve injurious or mischievous consequences to others. And the injury to plaintiff was not caused from the act of performance, but from the manner of performance over which, as has been seen, the company neither reserved nor exercised direction, control, or supervision. We think, therefore, that the case comes within the general rule that when a person employs a contractor to do work lawful in itself and involving no injurious consequences to others, and damage arises to another through the negli-

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gence of the contractor or his servants, the contractor, and not the employer, is liable. We think the ruling right.

The judgment thus appealed from by the plaintiff is affirmed with costs.

McCARTY, C. J., and FRICK, J., concur.

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### STATE v. BRIGGS,

No. 2604. Decided March 19, 1915 (146 Pac. 261).

1. **CONSTITUTIONAL LAW—PROTECTION OF PROPERTY—POLICE POWER.** All constitutional provisions relating to the rights of acquiring, possessing, and protecting property must be construed as subject to the police power of the state, unless the Constitution expressly provides otherwise. (Page 290.)
2. **INTOXICATING LIQUORS—PROHIBITION—CONSTITUTIONALITY.** The state has the right, under its police power, absolutely to prohibit the sale of intoxicating liquors; the provisions of the state Constitution respecting the protection of property rights being no broader than those of other states. (Page 290.)
3. **CONSTITUTIONAL LAW—INTOXICATING LIQUORS—LOCAL OPTION—CONSTITUTIONALITY.** The local option statute is not unconstitutional as a delegation by the state of its police power to municipalities, since it may make such delegation in the premises. (Page 291.)
4. **CONSTITUTIONAL LAW—DELEGATION OF POWER—LOCAL OPTION LAW.** Laws of 1911, c. 106, the local option statute, is not unconstitutional as being a delegation of legislative powers to the voters of the various local option units, since all that such voters may do under the act is to choose one of two methods to control the liquor traffic. (Page 291.)
5. **STATUTES—LOCAL OPTION LAW—CONSTITUTIONALITY.** Laws of 1911, c. 106, the local option statute, is not unconstitutional as a general law and not of uniform operation.<sup>1</sup> (Page ....)

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<sup>1</sup>Peterson v. Petterson, 42 Utah, 270, 130 Pac. 241.

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Appeal from Utah County District Court.

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STRAUP, C. J., dissenting in part.

Appeal from District Court, Utah County; *Hon. A. B. Morgan, Judge.*

Lawrence Briggs was convicted of crime, and he appeals.

**AFFIRMED.**

*M. E. Wilson and Snyder & Snyder*, for appellant.

*A. R. Barnes*, Atty. Gen., *E. V. Higgins* and *G. A. Iverson*, Asst. Attys. Gen., for the State.

FRICK, J.

The appellant was prosecuted and convicted in the justice's court of American Fork precinct for having unlawfully sold intoxicating liquors. He appealed to the district court of Utah County, and upon a trial to a jury was again convicted and now appeals to this court. In view that the case originated in the justice's court, we, under our Constitution, are prohibited from inquiring into any question, except the validity of the law upon which the conviction and judgment are based. The complaint against appellant was based upon chapter 106, Laws of Utah 1911, p. 152, which is a so-called local option statute, and for the violation of which he was duly convicted as aforesaid. We remark that we have had occasion to consider and pass upon many of the provisions of said chapter 106 in the cases of *Pleasant Grove City v. Lindsay*, 41 Utah, 154, 125 Pac. 389, and *American Fork City v. Charlier*, 43 Utah, 231, 134 Pac. 739. We shall therefore not take the time nor space here to set forth any of the provisions of said act, except to say that it divides the state into what are called voting units, within which units elections may be called and held for the purpose of permitting the qualified voters therein to determine whether the sale of intoxicating liquors shall be permitted upon the terms and conditions provided in said act, or whether the sale thereof shall be prohibited and the prohibition thereof enforced as in said statute provided. All cities and towns are declared voting units,



and the territory in each county outside of cities and towns is also made a voting unit in each county for the purpose of the act. The validity of the act is assailed upon three grounds, which, stating them in counsel's own language, are:

“(1) That the statute violates section 1 of article 1 of the Constitution of the State of Utah, which guarantees to all men the right to acquire, possess, and protect property; and (2) that the local option feature of it is in violation of section 1 of article 6 of the Constitution, by the terms of which the legislative power is vested in the Senate and House of Representatives, and ‘in the people of the state of Utah, as hereinafter stated’; (3) It is a general law and is not of uniform operation.”

While it is conceded that the courts have repeatedly held that the state, in the exercise of its police power, may prohibit the sale of intoxicating liquors, yet it is vigorously contended that in view of the declaration of rights in article 1, section 1, of our Constitution, in which it is provided that “all men have the inherent and inalienable right \* \* \* to acquire, possess and protect property,” therefore the 1, 2 right to possess, and hence sell or otherwise dispose of all property which is not inherently dangerous, cannot be entirely prohibited by any legislative act. We have somewhat hastily examined the constitutional provisions of the several states respecting the right to acquire, possess, and protect property, and we find that the words used in our Constitution, namely, “to acquire, possess and protect property,” are also found in the Constitutions of California, Florida, Idaho, Iowa, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, and South Carolina; that in the states of Arkansas, Delaware, Kentucky, and West Virginia the provisions are practically the same as ours, while in South Dakota only the three words “acquire and protect” are used. In about all the other states, while the precise words of our Constitution are not used, yet, from the whole Constitution, it is apparent that there is very little difference in the legal effect of the Constitutions of the several states respecting property rights. The contention, therefore, which was made at the hearing, that

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our constitutional provision respecting property rights is broader than are those of the Constitutions of other states, cannot be maintained. All the constitutional provisions, however, respecting the rights of acquiring, possessing, and protecting property, in whatever terms expressed, must nevertheless be construed and applied in connection with the police power of the state, unless it is in express terms otherwise provided in the Constitution itself. In the face of the numerous decisions of the courts to the contrary, it is too late now to insist that the state has not the right to absolutely prohibit the sale of intoxicating liquors under its police power. We shall therefore not pause here to review the authorities upon that subject; nor is it necessary to do so. We shall call attention only to a few well-considered cases out of the great number that could be cited in connection with some of the text-writers upon the subject. See Cyc. 76 to 79, inclusive; Black on Intoxicating Liquors, Sections 39, 40; 1 Woollen & Thornton, Intoxicating Liquors, Section 162; *Feibelman v. State*, 130 Ala. 122, 30 South. 384; *Pennell v. State*, 141 Wis. 35, 123 N. W. 115; *Jordan v. City of Evansville*, 163 Ind. 512, 72 N. E. 544, 67 L. R. A. 613, 2 Ann. Cas. and note, pages 98, 99; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

Nor can the right of the state to delegate its police power in that regard to cities, towns and municipalities be successfully disputed. 3

The next proposition, namely, that Chapter 106 is void because it delegates legislative powers to the voters of the so-called voting units, has so often been considered and decided adversely to counsel's contentions that it seems 4 almost needless to refer to the matter again. Indeed, this court has passed upon the local option feature of the so-called herd law (Comp. Laws 1907, Sections 18, 19, 20), in which the question of fencing and permitting animals to go at large may be submitted to and determined by a majority of the voters of any county or precinct. See *Peterson v. Peterson*, 42 Utah 270, 130 Pac. 241, where we held that such a law is not invalid upon the ground that it delegates legislative powers to the voters. Counsel have, however, cited four

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cases which hold to the contrary, namely, *Rice v. Foster*, 4 Har. (Del.) 479, decided in 1847; *Meshmeier v. State*, 11 Ind. 482, decided in 1858; *Ex parte Wall* 48 Cal. 279, 17 Am. Rep. 425, decided in 1874, and *Thornton v. Territory*, 3 Wash. T. 482, 17 Pac. 896, decided in 1888. All these cases have, however, so often been overruled by the courts that they are now no longer regarded as authority upon the questions there decided. In the following, among a very large number of cases that could be cited, the question raised by counsel is decided contrary to their contentions: *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 1000; *Ex parte Beck*, 162 Cal. 701, 124 Pac. 543; *Gordon v. State*, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *State v. District Court*, 33 Minn. 235, 22 N. W. 625; *City v. Hills*, 55 Iowa 643, 8 N. W. 638; *Savage v. Commonwealth*, 84 Va. 619, 5 S. E. 565; *Joyce on Intoxicating Liquors*, Sections 368 to 371, inclusive; 1 Woollen & Thornton, *Intoxicating Liquors*, Sections 155 to 166, inclusive. In the cases and text books referred to the question is so thoroughly discussed and the conclusions there reached by both the text-writers and the courts are so strong against counsel's contentions here that we could add nothing, even if we had a disposition to do so. We remark, however, that there is nothing in Chapter 106 which in any way delegates legislative functions to any one. All the voters are permitted to do in a given case is to choose either one of two methods of governing or controlling the liquor traffic. When one or the other of the two methods, namely, sale or no sale, is chosen, the law determines just how the particular method of control which is chosen shall be enforced precisely the same as if no right of choice of methods had been conferred on the voters. How, then, can it be successfully contended that the people either enact or repeal the law? The principle involved here is readily distinguishable from the one involved in a case where the Legislature formulates a certain measure and submits the same to the voters for the purpose of determining whether such measure shall or shall not become the law respecting the matter or subject which it covers. In such a case it is manifest that there is no law until the voters

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by a majority vote approve the proposed measure. Upon the other hand, if a majority of the voters vote against the proposed measure, it never becomes a law. The voters, therefore, in such a case, to all intents and purposes, create or make the law, since it is not the law until they so declare. Not so here. The law is in full force as a law, regardless of what the voters in the one or the other voting unit may determine by their votes. The first is a pure case of so-called referendum, while the latter is not. Had Chapter 106 been submitted to the voters for approval or rejection, the case would be different.

The third proposition is also decided against counsel's contentions to nearly all if not all of the cases to which we have referred. The question was also before us in *Peterson v. Petterson*, *supra*, and we there held contrary to counsel's contentions. 5

It is not necessary to prolong this opinion. We are clearly of the opinion that Chapter 106 is not vulnerable to the objections urged against it by counsel.

The judgment is therefore affirmed. Appellant to pay the costs of respondent's brief.

McCARTY, J., concurs.

STRAUP, C. J.

I concur, but because this is a criminal case I do not concur in the order directing the appellant to pay costs. I also withhold assent to the proposition so broadly put, that all constitutional provisions conferring rights to acquire and possess, and affording protection to, property, are subject to the police power of the state. As to the question in hand, I think this: Prohibiting, regulating or restricting within the limits of the state the manufacture or sale of intoxicating liquors as a beverage is a lawful exercise of the police power of the state, and for various reasons often stated is not open to the claim that the constitutional provisions referred to by such prohibition, regulation or restriction are invaded. But to say that all property is acquired and held subject to the police power of the state is a different matter. I do not now yield assent to that.

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## CUMMINGS et ux. v. NIELSON et al.

No. 2681. Decided June 24, 1915 (150 Pac. 295).

**SPECIFIC PERFORMANCE—GROUNDS OF RELIEF—CONTRACT TO PURCHASE REAL ESTATE.** The holder of an option to purchase real estate upon as low terms as should be offered by any other party cannot, after refusing to purchase the property at the price offered by another and after sale made upon such offer, maintain a bill for the cancellation of the deed to such purchaser, and for specific performance under the option.

For first appeal of this case see 42 Utah 157.

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by Horace H. Cummings and wife against Christian Nielson and others.

Judgment for defendants. Plaintiffs appeal.

**AFFIRMED.***Moyle & Van Cott* for appellants.*Hancock & Barnes, J. Ingebretsen* and *Dey, Hoppaugh & Fabian* for respondents.

STRAUP, C. J.

In October, 1905, the plaintiffs and the defendants Nielson entered into this written agreement.

“This agreement made and entered into between Horace H. Cummings and Barbara M. Cummings, his wife, first part, and Christian Nielson and Sarah E. Nielson, his wife, second part, all of Salt Lake City, Salt Lake County, Utah, witnesseth: That the said second party hereby sells and conveys to the first party all their right, title and interest in the Cummings-Nielson Co. represented by fourteen shares of the capital stock (one share of their original investment having been

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sold to James Nielson), and also to give an option on all their or either of their interest in the estate of Julian Moses, deceased, or refusal to purchase the same at a price as low as any other *bona fide* offer for it or any portion of it, for the sum of five hundred eighty (\$580) cash, the receipt of which is hereby acknowledged, and four hundred thirty (\$430) within six months from date hereof. The said second party shall also see that the 10 shares of stock which is now held as security of certain payments to be made to Ruth Moses shall be liberated before the said second payment is made.

"In consideration of the transfer of stock and the fulfilling of the aforesaid covenants and conditions, the first party agrees to make the payments as aforesaid, viz.: \$580 cash and \$430 in six months from date hereof."

It was not recorded. Thereafter the Nielsons by deed conveyed the real property referred to in the agreement—their interest in the estate—to Stillman. The plaintiffs seek to have that deed canceled, the contract specifically performed and the property conveyed to them. The case was here before. 42 Utah 157, 129 Pac. 619. The contract was then considered by us. We held the motion for a nonsuit directed against the appellants was improperly granted. The case thereafter was tried on the merits, and resulted in findings and judgment in favor of the defendants. The plaintiffs again appeal. The court found that the plaintiff Barbara M. Cummings, and the defendant Sarah Sarah E. Nielson and Esther B. Swain were sisters, daughters of Julian Moses, deceased. On administration and distribution of his estate the lands referred to in the agreement were distributed in fee to them, subject, however, to a life estate in Ruth R. Moses, the surviving widow. The decree was recorded in 1899. In 1908 the Nielsons "tendered and offered to sell" their interest in the property to the Cummingses "at as low a price as any other offer for it, and upon the terms of said contract, but the said parties neglected and refused to exercise the option to purchase granted by said contract, and refused to purchase said property at all, and that the said contract, in so far as the same granted or conferred upon the said" Cummingses "any interest, any right, any option to purchase the interest of the

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said" Nielsons "in the estate of Julian Moses, deceased, had lapsed, and the plaintiffs had refused to conform to the conditions thereof prior to the 11th day of July, 1908, and long prior to the purchase of the interest of the said Sarah E. Nielson in said premises" by the Stillmans. On the 11th of July, 1908, the Nielsons, by warranty deed, conveyed their interest to Stillman. It was recorded two days thereafter.

The court further found:

"That the purchase price \* \* \* for the conveyance was \* \* \* \$3,000, to be paid as follows: \$500 on the execution of said deed, \$500 6 months thereafter, \$500 12 months thereafter, and \$1,500 60 days after the death of Ruth R. Moses, and that said consideration has been paid substantially at the time and in the manner above set forth. That neither at the time of said conveyance, nor at any date prior thereto, did the defendants Forest N. Stillman and Mrs. Forest N. Stillman have any knowledge or notice whatsoever of the existence of the contract between the plaintiffs and the defendant Christian Nielson and Sarah E. Nielson, heretofore recited, nor any knowledge or notice that the said plaintiffs had or claimed any interest whatever in or to the estate conveyed to the said defendant Forest N. Stillman, as aforesaid. That the said conveyance was not made wrongfully nor in violation of said agreement, nor was the said Forest N. Stillman informed at, nor at any time prior to, the execution and delivery of said deed, nor did the said Forest N. Stillman know that the plaintiffs had, or owned, or claimed, any right or option to purchase the interest of the said Sarah E. Nielson or her husband in or to the said estate of Julian Moses, deceased, or any right or option to purchase the interest of said Sarah E. Nielson and husband in and to the lands and premises hereinbefore described. That said conveyance was not void or fraudulent, but to the contrary was made in good faith for a valid consideration and without notice of any kind of any of the claims of the plaintiffs herein."

The court further found:

"That after the making and delivery of the agreement \* \* \* and while the said \* \* \* (the Nielsons) were negotiating with the said defendant Forest Stillman for the

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purchase of said property and after they had secured an offer of \$3,000 therefor from the said Stillman, the said \* \* \* (the Nielsons) informed the said Horace H. Cummings and Barbara M. Cummings that they had an opportunity to sell said property for \$3,000, and that they had decided to sell the same for that sum, and also requested the plaintiffs to purchase said property from them at said price of \$3,000; that in response to said request said plaintiffs first suggested to the said Nielsons that they (the said Cummingses) would take the property at said price, but shortly thereafter stated to the said Nielsons that they were disappointed in raising money and could not and would not take the property and pay for same the sum of \$3,000, and suggested that they might take the property if payments therefor could be made in installments; that several plans for the payment of said purchase price were suggested by the said plaintiffs to the said Nielsons; that the said Nielsons stated to the said plaintiffs that, while such offers were not satisfactory, nevertheless they would be accepted; that notwithstanding all of these negotiations, nevertheless the plaintiffs failed to purchase said property, and finally informed the said Nielsons that they would not purchase the property for \$3,000 under any of the plans suggested, and would not pay the sum of \$3,000, either in cash or deferred payments, and advised the said Nielsons that they did not care to purchase the property at all, and would not buy the same, and that the said Nielsons might sell the property to any one or do with the same as they pleased."

When the property was conveyed to Stillman, Ruth R. Moses was seventy years of age, and "while in poor health and feeble, nevertheless her illness was not of a fatal character, nor was there any reason to believe that the life estate would soon terminate." She died in January, 1910.

The court further found:

"That on or about the 1st day of December, 1908, the plaintiffs learned of the purchase of said premises by the defendant Forest N. Stillman, but made no attempt to claim any interest in said premises under said option, or to exercise said option, until the death of the said Ruth R. Moses as aforesaid."



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The suit was commenced in February, 1910.

Upon these findings the court refused to grant specific performance, and adjudged Stillman the owner and entitled to the possession of the property. The findings are assailed. The complaint is that they are not supported by and are contrary to the evidence. On a review of the record we find the evidence in conflict. There is some evidence in support of all of the findings. It is not strong as to the finding that Stillman purchased without notice. It may be conceded the weight of the evidence is against that finding. But that alone does not justify a different result. The finding that the Nielsons, before they sold to Stillman, offered to sell to the Cummingses, but that they declined to purchase for the sum of \$3,000, is well supported. There is no substantial conflict that they offered to sell the property to them for that sum. There is a conflict, however, as to this: The Cummingses contend that they offered to pay \$3,000, but at the rate only of \$25 a month. That was not satisfactory to the Nielsons, and then the Cummingses offered to pay \$50 a month, which finally was accepted, but that the Nielsons failed to come forward with a deed. The Nielsons contended that the Cummingses finally declined to pay \$3,000 for the property either in cash or installments, stating that that was too much, and that the Nielsons could sell to another, if they could get that for the property; and thereupon they sold the property to Stillman for \$3,000 upon terms as found, and that all of the consideration had been paid. As to these contentions we think the Nielsons are supported, not only by good evidence, but by the greater weight of the evidence, and that the findings ought to be approved. With that finding the Nielsons offered to perform, but the Cummingses failed or declined to perform the contract, and hence the latter are not entitled to specific performance. The ownership of the property in Stillman on the deed from the Nielsons follows as matter of course.

We, therefore, think the judgment should be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

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Appeal from Second District.

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**ROCKY MOUNTAIN STUD FARM CO. v. LUNT et al.**

No. 2612. Decided June 24, 1915 (151 Pac. 521).

1. **JOINT-STOCK COMPANIES—PARTNERSHIP—TENANCY IN COMMON—WHAT CONSTITUTES.** Where a number of individuals purchased a horse, each owning a share in the animal proportioned to the amount he paid, the owners did not constitute a partnership or a joint-stock company, but were merely tenants in common. (Page 310.)
2. **TENANCY IN COMMON—RIGHTS OF COTENANTS.** Where a number united in purchasing a horse, but did not form a partnership or a joint-stock company, each owner could sell his interest, regardless of the others, although he could exercise no control over the interests of his fellows; and hence, where some of the purchasers of the horse agreed to exchange it for another and to pay boot money, the seller of the second horse, who received their interests and the boot money, had no right of action, though some of the first owners would not agree to the transaction. (Page 310.)
3. **TENANCY IN COMMON—AGENCY.** The mere fact that a number united in purchasing a horse does not render them agents for each other in disposing of the animal. (Page 310.)
4. **PARTNERSHIP—POWERS OF PARTNERS—TENANTS IN COMMON** Every partner has full and complete authority to bind all other partners by his acts or conduct in relation to the business of the firm, and to the same extent as if he held full power of attorney from all members. (Page 310.)
5. **TENANCY IN COMMON—RIGHTS OF COTENANTS.** Where inseverable personal property is held by several persons as joint tenants, the tenant in actual possession may retain it as against his cotenants. (Page 310.)
6. **EXCHANGE OF PROPERTY—PERSONAL PROPERTY—CONTRACT.** Where plaintiff in making a trade of horses, dealt with the several owners as individuals, they cannot escape liability for boot money on the ground that his first proposal was that, if all the parties interest in the horse would not agree to the sale, it should not be consummated. (Page 313.)
7. **PARTNERSHIP—LIABILITY OF PARTNERS.** Some of the owners of a horse entered into an agreement with plaintiff to exchange that animal for another on payment of certain boot money. Some of the owners refused to participate in the agreement, and plaintiff settled with some of those who did. Held that,

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though the nonassenting owners be considered partners, they were not liable, for, where the liability has clearly attached, subsequent transactions between third persons and one of the partners may work an extinguishment. (Page 313.)

8. **JOINT-STOCK COMPANIES—WHAT ARE.** A joint-stock company is generally classified as a partnership, possessing some of the characteristics of a corporation; its members being liable ordinarily as partners. (Page 315.)
9. **JOINT-STOCK COMPANIES—ACTIONS AGAINST—INSTRUCTIONS—SUBMISSION OF ISSUES.** Where defendants in their answer characterized themselves as a joint-stock company, and there was evidence that some of the defendants effected individual settlement of the claim, the court should submit to the jury whether the settlement was intended as an accord and satisfaction of the claim—discharged the obligation—as to such defendants. (Page 315.)
10. **RELEASE—JOINT DEBTORS—EFFECT.** Ordinarily the discharge of one joint debtor discharges his codebtor. (Page 315.)

Appeal from District Court, Second District; *Hon. N. J. Harris*, Judge.

Action by the Rocky Mountain Stud Farm Company, a corporation, against H. H. Lunt and others.

Judgment for plaintiff against some of defendants, and for some of the defendants against plaintiff. All parties appeal.

REVERSED and remanded, with directions.

*E. H. Ryan* and *H. H. Henderson* for plaintiff.

*Joseph Chez* for defendants.

#### STATEMENT OF FACTS.

This is an appeal from a judgment rendered in the District Court of Weber County. The action was brought to recover the sum of \$2,026.69, a balance alleged to be due on the purchase price of a Clydesdale stallion known as Sir Charles Lynni. The facts are about as follows:

On or about May 10, 1910, the defendants and six other parties, all residents of Cedar City, this state, jointly purchased

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for breeding purposes a stallion known as Buffet. The purchase price of the animal was \$2,600, which was divided into fifty-two shares of the par value of \$50 each. These parties, twenty-eight in number, were engaged in various occupations common in the rural and farming district of this state, such as agriculture, raising cattle and sheep, and, in a limited way, raising horses. It seems that their purpose in purchasing the horse Buffet was to improve their stock of domestic horses. This was the only profit contemplated or realized from the investment. For convenience they called themselves the French Coach Horse Company, hereinafter referred to as the company. No writings were signed by the parties, nor did they have any by-laws in writing regulating the management of the affairs of the company. The members orally agreed that for each share or interest a member had in the horse he was entitled to breed one mare—that is, members owning one share only, fifty dollars in the stallion, were each entitled to breed one mare; members owning \$100 two, and those owning \$200 were entitled to breed four mares. The company kept a book called a "stock book" in which were entered the names of the members and the number of shares that each owned in the horse. It also appears from the evidence, what there is on the point, that each member of the company was assessed five per cent. on his investment to pay the cost of keeping and caring for the horse. These matters may appear on the first impression to be unimportant, or, at most, only incidental to the question involved. They nevertheless throw considerable light on the transactions hereinafter referred to and out of which this controversy arose. On July 3, 1910, E. W. Patrick, who was and is the president of plaintiff corporation, and who seems to be its business manager, came to Cedar City, bringing with him the Clydesdale stallion hereinbefore mentioned. On his arrival Patrick immediately commenced negotiating with members of the company with the view of selling to the company the Clydesdale stallion. He offered to sell the horse for \$3,400 and to accept the horse Buffet in payment of \$1,900 on the purchase price. A meeting at which Patrick was present was held by certain members of the com-

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pany to consider the proposition. The offer was rejected by practically all the members who were present at the meeting. A few days thereafter two members of the company, P. B. Fife and J. H. Hunter, decided to make Patrick a tentative offer of \$800 cash and the horse Buffet for the Clydesdale stallion, and Fife telephoned Patrick, who, in the meantime, had left Cedar City, submitting to him the proposition.

Fife was called as a witness by the plaintiff, and testified in part as follows:

"I 'phoned Mr. Patrick, who was at Kanarra, and we talked \* \* \* for a while; and he says, 'I will take \$1,250 to boot between the coach horse (Buffet) and Sir Charles Lynn. If you will look around and see if you can get eighteen men to sign up, I will come back and consider it.' "

Continuing, the witness said:

"I talked with some of the members of the Coach Horse Company to ascertain their frame of mind. I interviewed some 16 or 18 of them. I told the members I met of the proposition."

For this service Patrick paid Fife forty-eight dollars. Patrick does not deny that he authorized Fife to represent to members of the company that he (Patrick) had offered to trade horses with them provided they would pay \$1,250 "to boot." In pursuance of the negotiations carried on by Fife and the representations made by him on behalf of Patrick to members of the company, Patrick returned to Cedar City about July 10, 1910. Immediately on his return, he commenced negotiating with members of the company for the sale, as he claims, of the Clydesdale horse. It seems that he called at the residence or place of business of each member of the company and submitted to him a proposition which he had reduced to writing. In this way he procured the signatures of twenty-three members of the company to the instrument. Six members refused to sign the contract or to have anything to do with the transaction. The contract is as follows:

"It is hereby agreed this .... day of July and August, 1910, by and between the Rocky Mountain Stud Farm Com-

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pany of Ogden, Utah, and the undersigned, residents of the County of Iron, State of Utah, whereby the undersigned have purchased from the Rocky Mountain Stud Farm Company one registered Clydesdale stallion, known as Sir Charles Lynn, for and in consideration of the sum of thirty-four hundred dollars (\$3,400), and upon the following conditions:

"First. The Rocky Mountain Stud Farm Company guarantees said Sir Charles Lynn to be a 60 per cent. foal getter for the season of 1911, if bred to good producing mares and properly handled and cared for by the purchasers; but, should the said Sir Charles Lynn not prove to be a 60 per cent. foal getter under the above conditions, then the said purchasers agree either to relieve the Rocky Mountain Stud Farm Company from all liabilities and damages occurring on account of said Sir Charles Lynn not proving to be a 60 per cent. foal getter, or else return said Sir Charles Lynn to the barn of the seller in as sound condition as he now is, and there receive another horse of equal value that is supposed to be a sure foal getter, in full settlement of all damages occurring on said account.

"Second. The purchasers agree to furnish the Rocky Mountain Stud Farm Company with a monthly report in writing, stating the number of mares tried, bred and reserved, as well as the conditions of the horse.

"Third. The Rocky Mountain Stud Farm Company agrees, in case the said Sir Charles Lynn should die from natural causes within a period of three years from the date of this contract, to sell to the undersigned purchaser another horse of equal value to said Sir Charles Lynn for the sum of seventeen hundred dollars (\$1,700).

"Fourth. Each and all of the undersigned purchasers agree that the purchase price, thirty-four hundred dollars (\$3,400), shall be paid to the order of the Rocky Mountain Stud Farm Company at Ogden, and among themselves agree that they shall pay proportionately the amount set opposite their names.

"Fifth. It is further agreed that payments shall be made in cash, or at the option of the purchasers they may execute

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the following payments, viz.: Twelve hundred and fifty dollars cash upon tender of delivery of said Sir Charles Lynn by the seller and the delivery by the purchasers of a certain nine year old Coach imported stallion Bufford (Buffet).

"Sixth. There are no other conditions pertaining to this contract and no salesman or agent has power to change or modify. Time is of the essence of this contract.

"This contract is executed in duplicate, each party holding a copy. (Signed) H. H. Lunt. Peter B. Fife. Samuel Bauer. Samuel W. Leigh. K. L. Jones. Thomas Dix. Jno. E. Dover. David Bulloch. Daniel Stephens. William Macfarlane. A. Webb. Charles Mosdell. Henry Leigh. J. H. Hunter. J. H. Arthur. Andrew Corry. Arthur Jones. Herbert W. Webster. James Bulloch. Jno. T. Bulloch. Jno. Bauer. Chauncey Macfarlane. Francis Webster, Jr."

Twelve of the twenty-three men who signed the foregoing document were witnesses and testified at the trial. Each of them, except Fife, testified that when Patrick presented the writing he at first refused to sign it, and that Patrick represented to him that he was the only member of the company who was opposed to the trade; that the other members were all in favor of the deal; that unless he (Patrick) succeeded in procuring the signature of every man owning the interest in the horse Buffet to the document the trade would be abandoned, and the parties signing the instrument would not be bound thereby; and that he signed it with this express understanding. Patrick, however, testified that he made no such representations and that there was no such understanding. The evidence, without conflict, shows that during the time he was procuring signatures to the contract he represented to members of the company that he intended, if the deal should go through, to remove the horse Buffet from Cedar City and take him into the northern part of the state. To do this it was necessary for him to purchase the interest each member of the company had in the horse. So long as any member of the company retained an interest in the horse, Patrick could not legally take it out of the country, or otherwise dispose of the animal to the prejudice of his co-owners. Again recurring to the alleged representations made by Pat-

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rick to the members of the company to induce them to sign the contract, Fife, who, as stated, was plaintiff's witness, testified on cross-examination in part as follows:

"Q. Do you remember the paper being handed to you and you refusing to sign it? A. Yes, sir. I told him when I looked at the paper that I did not want to sign this; that it was a contract. We ain't offered to buy the horse at all—wouldn't have the horse if we have to pay for him out and out. Q. In other words, it was to be a trade, and not a sale? A. That was definitely understood between him and me, that I would not sign under them conditions (referring to certain provisions of the contract). It was to be a trade. We were to pay \$1,250 and the coach horse for Sir Charles Lynn. The sale was never talked of between him and me."

W. E. Corry, one of the members of the company who refused to sign the document, testified, and his testimony is not disputed, that Patrick asked him if he was willing to "trade," and that he answered, "No, sir"; that Patrick said that he—"would guarantee me dollar for dollar in the Clyde horse for what I had in the coach. At another time he asked me to sign the paper to show that I was willing if all the others were willing. Finally, when he told me that I was the only man blocking the deal for 27 or 28 of my fellow townsmen, I told him he could count on me. He says, 'Sign the paper.' \* \* \* I refused to sign the contract, and told him that unless he brought me a contract strictly setting forth the provisions of the trade I would not sign it. \* \* \* I says, 'If I sign \* \* \* what have I got from you that you ain't going to enforce the provisions of your \* \* \* agreement?' He says, 'You have got my word.' I says, \* \* \* 'I believe that if you cannot rib through that trade, that you have ribbed up there, that you are going to force the men that have signed that contract to pay you \$3,400 for the Clydesdale horse.' He says, 'You don't believe it.' I says, 'I do believe it.' I never signed the agreement."

On cross-examination the witness said, referring to the members of the company:

"Knowing these men as I do, I don't think they would sign



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a contract, if it had been explained to them, \* \* \* to buy that horse for \$3,400."

The foregoing fairly illustrates the testimony of the defendants respecting the alleged representations made by Patrick to induce them to sign the agreement, as well as the conditions under which they signed it. When it became known that Patrick was unable to procure the signatures of all the members of the company to the agreement, those who had signed it, with the possible exception of one or two, refused to close the deal by transferring their interest in the horse Buffet to Patrick and paying him \$1,250 cash "to boot," the agreed difference in the value of the two horses. Patrick, on being advised that certain members of the company were dissatisfied and had announced that they would neither transfer their interest in the horse Buffet to him nor pay the \$1,200 cash, or any part thereof, stipulated in the agreement, "called a meeting" and hired a boy to notify the parties who had signed the agreement that he would meet with them in the "town hall," presumably to consider their grievances. This meeting was held about August 15, 1910. Nothing was accomplished at this meeting by way of settlement between Patrick and the signers of the agreement. Patrick in the meantime had delivered Sir Charles Lynn to one of the members of the company, D. C. Bulloch, who had signed the agreement. Immediately after the meeting last referred to Patrick made a demand on each person who had signed the agreement to transfer his interest in Buffet to plaintiff and to pay his *pro rata* of the \$1,250 mentioned in the agreement, which amounted to twenty-four dollars for each share or interest (fifty dollars) he owned in the horse. This the parties at first refused to do, claiming that since Patrick had failed to procure the signatures of all the members of the company to the agreement, as he had promised to do, they were not required to complete the deal on their part.

Each of the defendants present at the trial testified that Patrick threatened that unless his demand was complied with he would commence an action in the District Court of Weber County against all who had signed the agreement; that Patrick promised him that, if he would transfer to plaintiff

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his interest in Buffet and pay his *pro rata* of the \$1,250, he would be released from all obligations under the agreement, and with this understanding he transferred his interest in the horse and paid the amount of cash demanded of him. Patrick denied that he made any such promises. Each of the defendants who transferred his interest in Buffet and paid his *pro rata* of the \$1250 received from Patrick a receipt showing the transfer of his interest in Buffet and payment of the money and that he had purchased an interest in Sir Charles Lynn. One of the defendants, A. Webb, gave his note for ninety dollars in settlement of the claims made against him by Patrick. While there is no direct evidence on the point, it seems, from the character of the questions propounded to Webb by plaintiff's counsel, that plaintiff negotiated the note and transferred it to one of the banks in Ogden City. This, however, is unimportant, except that it illustrates the unconscionableness on the part of the plaintiff in dragging this defendant into court hundreds of miles from his home on a claim which we have a right to infer from the statements made in open court, through its counsel, it had sold and transferred to third parties.

The record shows that Patrick succeeded in completing a sale, or, more correctly speaking, in exchanging interests in the Clydesdale horse, Sir Charles Lynn, for interests in the horse Buffet and a stipulated amount of cash with the following defendants: A. Webb, Daniel Stephens, Will Macfarlane, Peter B. Fife, Chauncey Macfarlane, Samuel W. Leigh, J. H. Hunter, J. H. Arthur, John T. Bulloch, David C. Bulloch, H. H. Lunt, Herbert W. Webster, John Bauer and K. L. Jones. It appears that several members of the company who signed the agreement failed to pay their *pro rata* of the \$1,250. It seems, however, that their respective interests in Buffet were transferred on the stock book of the company to the plaintiff. The horse Buffet was not delivered to the plaintiff, but remained in the constructive, if not the actual, possession of the members of the company who were not parties to the deal under consideration.

On May 11, 1911, plaintiff commenced this action in the District Court of Weber County to recover the balance

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(\$2,026.69 and interest) alleged to be due and owing on the agreement herein set forth, making all members of the company who had signed the instrument defendants. Sixteen of the defendants filed a joint answer, and, after denying the alleged indebtedness, alleged as an affirmative defense that they were induced to sign the instrument herein referred to as the "agreement" through fraudulent conduct and the false and fraudulent representations of Patrick herein referred to; and they also alleged that they had transferred their respective interests in Buffet and paid a stipulated amount in cash, demanded by Patrick, to plaintiff, with the express understanding that they and each of them would be released from all claims and demands made by plaintiff because of the execution of the agreement. In other words, the allegations of the answer in that regard were to the effect that they had "purchased their peace," and that they transferred their interests in Buffet and paid the amount of money demanded by Patrick as an "accord and satisfaction" of all demands made against them growing out of the transactions herein referred to. They also alleged that because of the fraudulent transactions of Patrick they have been deprived of the service of the horses mentioned for breeding purposes (notwithstanding members of the company have had the continued and undisturbed possession of both horses), to their damage in the sum of \$440. In their prayer they demand judgment against plaintiff for—"the sum of \$1,275, the value of the stock transferred by defendants to plaintiff, and \$615.55, paid by defendants to plaintiff, and the sum of \$440 damages for the loss of the services of both of said horses, amounting in all to the sum of \$2,330.55 damages."

The other defendants also filed a joint answer, which contains substantially the same matter as the above. The only relief, however, asked for, is that plaintiff "take nothing, and that his complaint be dismissed," and that they recover costs. The cause was tried to a jury. When the evidence was all in, and both sides had rested, the court, on motion of counsel for plaintiff, withdrew the case from the consideration of the jury as to fourteen of the defendants, and made findings, conclusions of law, and rendered judgment against them in

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favor of plaintiff for the sum of \$2,028.69 and legal interest thereon amounting to \$395.59, and \$292 costs, making a total of \$2,716.28. As to the remaining eight defendants, the cause was submitted to the jury, who returned a verdict in favor of "all the defendants" and against the plaintiff for the sum of \$848.90 and interest, amounting to \$167.06, making a total of \$1,015.96. Judgment was duly entered on the verdict as rendered. The plaintiff and all of the defendants appeal.

± McCARTY, J. (after stating the facts as above).

We know of no rule or principle of law applicable to the facts of this case upon which the judgments or either of them, can be upheld. The case was tried by plaintiff on the theory that the defendants and other parties owning an interest in the horse Buffet were co-partners and that the French Coach Horse Company was a partnership concern. The agreement on which the action is based was executed by the several defendants, each one acting for himself, and not in any sense acting for or representing any of the others, in the transaction; and the action was brought against them in their individual capacity, and not as a company. It is not alleged in the complaint, nor does the complaint contain any matter from which it may be inferred, that the defendants were co-partners, or that plaintiff so regarded them at the time of the execution of the agreement. The defendants framed their answers on the theory that they were a joint stock company, but tried the cause to the court and jury on the theory that they were neither a company nor a partnership. The court submitted the issues to the jury on the theory that the defendants were partners in the transactions mentioned. In its charge the court told the jury that:

"The company referred to in this action as the French Coach Horse Company must be considered only as a partnership, so far as the dealings of its members with third parties or the plaintiff herein are concerned."

The court, however, made findings of fact and rendered judgment thereon against 14 of the defendants in their individual capacity, and not as a company or as a partnership,

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and judgment was also entered on the verdict returned by the jury in favor of "all the defendants" as individuals, and not as a partnership.

The French Coach Horse Company was not a partnership. Parsons on Partnership, Section 76. Neither was it a joint stock company. 23 Cyc. 467, 469; 17 A. & E. Ency. L. (2d Ed.) 636, 639. The defendants were co-tenants in the ownership of the horse. Freeman, Co-tenancy and Partition, Section 245. Each member of the company could, without obtaining the consent of or consulting the other members, sell or otherwise dispose of his interest in the horse; but 1-5 he could not exercise any control or supervision over the interest owned by the other members unless authorized by them to do so. Neither could either of the parties owning an interest in the horse sell or incumber the animal—the joint property, without the authority or consent of all. 23 Cyc. 494. The contractual relation of the defendants in that regard differed from that existing between members of a partnership, because co-tenants are not partners. Neither does the relationship of principal and agent exist between them, in the absence of an express or implied agreement to that effect. *Wright v. Kaynor*, 150 Mich. 7, 113 N. W. 779; 38 Cyc. 101. And in that regard a co-tenancy lacks some of the elements necessary to a creation of a joint stock company. 17 A. & E. Ency. L. (2d Ed.) 636, 637. The rule is elementary that in ordinary partnerships each partner is an agent for the firm, and has power to bind his co-partners by any act or transaction pertaining to the partnership dealings or that is within the scope of the business carried on by the firm. In Parsons on Partnership, Section 83, the author says that:

"Every partner has full and complete authority to bind all the partners by his acts or contracts, in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members."

See 30 Cyc. 477; Story on Partnership, Section 101.

A co-tenant, as stated, has no such power. He cannot sell or incumber the joint property without authority from his co-tenant. Nor can he, unless authorized so to do, exercise any

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supervision over the interest of any other co-tenant. In 17 A. & E. Ency. L. (2d Ed.) 672, the distinction between a cotenancy and a partnership is illustrated as follows:

"There is no relationship existing between cotenants, as between partners, which will render the acts of one cotenant respecting the common property binding on the others. No action of one or more of several tenants in common can impair the rights of the other cotenants. Either cotenant may charge his separate interest, or may convey or mortgage it, or become personally liable upon an undertaking respecting it."

And again:

"One tenant in common cannot bind his cotenant personally, nor by any unauthorized agreement or act, in respect to the common property."

In 7 R. C. L. 810, it is said:

"Partnership is distinguished from both species of cotenancy by the means and by the result of its creation. The means of its creation necessarily include an agreement between the parties; whereas, neither a joint tenancy nor a tenancy in common need rest upon any agreement. The ordinary incidents of the partnership relation, whereby each partner becomes the agent of the other, with authority to manage and dispose of the firm property, and to make all contracts within the scope of the business in which the firm was designed to engage, do not arise from a joint tenancy, nor from a tenancy in common. Partnership and tenancy in common also differ from each other in other important particulars. Each cotenant buys in, or sells out, or incumbers his interest at pleasure, regardless of the knowledge or consent or wishes of his co-owners, and without affecting the legal relation between them beyond the going out of one and the coming in of another. One cannot buy in or sell out of a partnership at pleasure, for such an act would of itself work a dissolution of the partnership, and necessitate its final settlement."

And again, on page 809:

"The partners have a joint interest in the assets of the partnership, and are required to sue and be sued jointly in reference thereto."

As pointed out in the foregoing statement of facts, Buffet was valued at \$2,600, which amount was divided into fifty-two shares or interests, of the par value of fifty dollars each. These shares or interests were held by twenty-eight persons, each of whom was the owner of from one to four shares. As

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stated, these people were co-tenants in the ownership of the horse. Therefore, to entitle plaintiff to the exclusive possession of the animal, it was necessary for it to purchase the interests held by each of the twenty-eight co-tenants. It is a well-recognized rule of law that, where inseverable personal property is held by several persons as joint tenants or tenants in common, the tenant in actual possession of the chattel may retain possession against his co-tenants. In 23 Cyc. 490, the rule is tersely, and, as we think, correctly stated as follows:

"Joint tenants' possession is in common, and each has a right to the enjoyment of the whole property to the extent of his interest. If only one of them is in the occupancy (possession) of the property, he must be considered as possessing, not only for himself, but also for the others and although it is competent for the joint tenants to make a subdivision of time for the exclusive occupancy (possession) of the whole of the joint property, one joint tenant cannot recover for exclusive possession of the premises (property) against his co-tenant."

See, also, Freeman on Co-tenancy and Partition, Section 245; 17 A. & E. Ency. L. (2d Ed.) 669, 670.

Patrick, for the purpose of disposing of Sir Charles Lynn, endeavored to deal with the members of the Horse Company collectively, but failed. He then sought to deal with the different members singly, and in their individual capacity, and succeeded in obtaining signatures of twenty-three of them to the agreement. Instead of relying on the terms of the agreement, and disposing of Sir Charles Lynn to the signers of the instrument collectively, and demanding of them the payment of the \$1,250 as therein provided, he demanded of each defendant that he transfer his individual interest in Buffet to plaintiff and pay his *pro rata* of the \$1,250. It appears that each of the twenty-three defendants transferred his interest in the horse to plaintiff and sixteen or seventeen of the defendants paid their *pro rata* of the \$1,250. David C. Bulloch, one of the defendants, at the time he transferred his interest, gave Patrick an instrument in writing, of which the following is a copy:

"Cedar City, August, 1910.

"For a valuable consideration I hereby transfer, assign and

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dispose of all my right, title and interest in the coach stallion known as Buffet, the same being free from all incumbrances and liabilities, and I defend E. W. Patrick as being the owner of the same in the sum of one hundred dollars.

“(Signed) David C. Bulloch.”

Bulloch received from Patrick an instrument in writing of which the following is a copy:

“\$130.60. Cedar City, August 19, 1910.

“Received from David C. Bulloch payment in full for one hundred and thirty 60/100 dollars, stock in the Clydesdale stallion Sir Charles Lynn. (Signed)

“The Rocky Mountain Stud Farm Co.,

“Per E. W. Patrick, Pres.”

A similar receipt was given to each of the other defendants who transferred their interest in Buffet to plaintiff and made the cash payment demanded by Patrick. These defendants thereby became co-tenants of plaintiff in the ownership of Sir Charles Lynn, and plaintiff became a co-tenant of the owners of Buffet who did not sign the agreement or otherwise dispose their interests in the horse. In other words, plaintiff sold sixteen or more separate and distinct interests in Sir Charles Lynn and purchased an interest in Buffet. The deal as to these defendants, therefore, became and was a completed transaction.

While plaintiff may have a separate cause of action against each of the defendants who signed the agreement, and who have made default in the payment of their portion of the \$1,250, it cannot, under the facts as disclosed by the record, maintain an action against those who have paid.

Counsel for the defendants, in the discussion of the case in their printed brief, lay much stress on the claim that each defendant signed the agreement with the understanding or on the express condition that all the members of the Horse Company should sign it before it would become a valid contract, and since Patrick failed to obtain the signatures of all of the members it never became a completed contract. Whatever defense the several defendants may have had to the enforcement of the agreement on that ground



in the first instance, they, by transferring their interests in Buffet to plaintiff with full knowledge that some of the members had not and would not join in the exchange of horses, will be deemed to have abandoned it, especially in view of the fact that Patrick, when he came to close the transaction, instead of relying on the terms of the agreement and dealing with them collectively, dealt with each individually; that is, the deal or trade he made with each defendant was a complete transaction in and of itself, separate and apart from the transactions he had with the other defendants, and none of the defendants were required to pay any more for an interest in Sir Charles Lynn than he would have been required to pay if all the members of the company had signed the agreement. In other words, being in possession of the horse Sir Charles Lynn, they are in practically the same situation as they would be if all the members of the Horse Company had signed the agreement and each had paid his *pro rata* of the \$1,250, except they have plaintiff for a co-tenant in the ownership of Sir Charles Lynn, instead of the six members of the company who retained their interest in Buffet. If all the members of the company had joined in the exchange of horses, they would have been jointly and severally liable to plaintiff under the agreement for the \$1,250, and as between themselves each would have been required to pay twenty-four dollars in cash for each interest he owned in Buffet.

Defendants having procured, in some respects, a more favorable settlement than they would have been entitled to if all the members of the company had joined in the deal, we fail to see wherein they were prejudiced because of Patrick's failure to obtain the signatures of all the members to the agreement. None of the defendants were therefore entitled, under any rule or principle of law governing transactions of the character here involved, to a judgment against the plaintiff. Moreover, as we have stated, when the several defendants transferred their interests in Buffet to plaintiff, and paid their proportion of the \$1,250 mentioned in the agreement, and were given an interest in Sir Charles Lynn, the deal as to each of them became a completed transaction. This would be so, even though the defendants were, as plaintiff

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claims, and as the court at certain stages of the proceedings seemed to hold, partners in the transaction herein mentioned. In Story on Partnership, Section 155, the author says:

"When the liability has clearly attached, and become absolute and binding, subsequent transactions between such third persons and one of the partners may work an extinguishment of such liability, either *wholly or partially*. Thus, if a partnership were originally liable to a creditor for a debt, and he should afterwards accept a security of one partner, at all events if it should be a security of a higher or negotiable nature for the whole debt, as a satisfaction thereof, *wholly or in part*, it will operate as an extinguishment of the debt of the partnership. Upon like ground, if the creditor should receive the separate security of each partner for his own share of the debt in satisfaction thereof, all joint liability of the partnership for the debt would henceforth be gone." (Italics ours.)

In this case the evidence is all but conclusive that most of the defendants who paid their portion of the \$1,250 mentioned in the agreement did so with the understanding and on the express condition that such payments should release them from all liability to plaintiff under the agreement. It is a well-recognized rule of law that, in ordinary partnership, a release by a creditor of one or more members from partnership liability operates as a release of all the members from such liability. 22 A. & E. Ency. L. (2d Ed.) 182; Parsons on Partnership, section 116.

A joint-stock company is generally classified as a partnership possessing some of the characteristics of a corporation. Parsons on Part., sections 431-434; Story on Part., section 164; 2 Page on Contracts 162; 17 A. & E. Ency. L. (2d Ed.) 637, 638; 23 Cyc. 467-469. In 2 Cook on Corporations, section 504, it is said:

"A joint-stock company lies midway between a corporation and a copartnership."

And again in section 508:

"A joint-stock company is, in regard to the liability of its members to creditors of the company, a partnership; its members are liable as partners; and the ordinary rules of partnership exist between the members themselves."

See 4 Words and Phrases, 2817. See, also, volume 2, Second Series, 1234-1236.

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The distinction is, so far as this case is concerned, unimportant. It may be contended, however, that since defendants have characterized themselves in their answers as a joint-stock company they are not entitled to have the case considered and ruled on any other theory. Assuming, for the sake of argument, that defendants were, as the court charged the jury, partners in the transactions herein referred to, the court should have submitted to the jury the question of whether the payments made by the majority of the defendants of their portions of the \$1,250 and the transfer of their respective interests in Buffet to plaintiff were intended as an accord and satisfaction of the claims,—discharge the obligation,—as to them.

“The general rule that the discharge of one joint debtor discharges his co-joint debtor is applicable to a discharge of one joint debtor by way of accord and satisfaction.” 1 R. C. L. 201.

The court, instead of submitting this question to the jury, erroneously charged them that the defendants, in “making such payments, \* \* \* affirmed and ratified such contract and would be liable to plaintiff thereunder,” and further erroneously charged that if the jury believed that certain defendants “made payment to plaintiff on the contract in question, \* \* \* and the plaintiff then promised said defendants \* \* \* that if they would make such payments plaintiff would take such payments in full for the amounts due from them, and that relying upon such promise said defendants did make such payments, \* \* \* such promise on the part of plaintiff was without consideration, and the plaintiff is not bound thereby.” We invite attention to this phase of the controversy for the purpose of emphasizing what we have already said, namely, that there is no rule of law applicable to the facts upon which the judgments, or either of them, can be affirmed, or the action entertained, regardless of whether defendants were cotenants, a joint-stock company or a partnership.

The cause is reversed, with directions to the trial court to set aside and vacate the decision and judgments rendered, and to dismiss the action as to all the defendants, but without

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prejudice as to any right of action plaintiff may have against the several defendants who have failed to pay their pro rata of the \$1,250 "boot" money. Costs to the defendants.

STRAUP, C. J., and FRICK, J., concur.

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LUKICH v. UTAH CONST. CO.

No. 2685. Decided June 24, 1915 (150 Pac., 298).

1. **APPEAL AND ERROR—MATTERS REVIEWABLE—JUDGMENT OF NON-SUIT.** A bill of exceptions reciting that defendant interposed a motion for nonsuit, that the jury were excused and after argument of the motion were returned into court, that the court sustained the motion, and stated that judgment for nonsuit might be granted, whereupon the jury were discharged, is insufficient to show the entry of an appealable judgment.<sup>1</sup> (Page 318.)
2. **APPEAL AND ERROR—RECORD—ORDER OF NONSUIT.** An order of nonsuit attached to a transcript, but not a part of the judgment roll, within Laws 1911, c. 94, providing that certain papers shall constitute the judgment roll, nor being included in the bill of exceptions, cannot be considered on appeal. (Page 318.)
3. **APPEAL AND ERROR—RECORD—"JUDGMENT."** A judgment being the final determination of the rights of the parties, to ascertain what in fact was determined, recourse should be had, not to the bill of exceptions, but to the judgment itself or to the judgment record or recitals of it. (Page 319.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Niko Lukich against the Utah Construction Company.

Plaintiff was non-suited. He appeals.

APPEAL DISMISSED.

*Weber & Olsen* for appellant.

*Howat, Macmillan & Nebeker* for respondent.

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<sup>1</sup>Robinson v. Salt Lake City, 37 Utah, 520, 109 Pac. 817.

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**STRAUP, C. J.**

Our statute permits an appeal from only a final judgment. It is the settled practice in this jurisdiction that an appeal does not lie from an order granting or over- 1 ruling a motion for a nonsuit or new trial. Such rulings can only be reviewed on an appeal from the judgment. We are asked to dismiss this appeal on the ground that the record fails to show a judgment.

We have before us a bill of exceptions. It shows that the plaintiff, the appellant, to support the issues in his behalf, adduced his evidence and rested. It then recites that the defendant interposed a motion for a nonsuit; that the jury were excused, and, after presentation and argument of the motion, were returned into court. Then:

“The Court: In this case the court sustains the motion for a nonsuit, and judgment for nonsuit may be granted.”

It further recites:

“Whereupon the jury are, by the court, discharged from further consideration of the case.”

The certificate recites:

“The above and foregoing contains all the evidence and testimony in the above-entitled cause and all the proceedings, all of the exceptions taken, and it is a full, true, and correct transcript of the testimony and other proceedings had on the trial of said cause, and the same is hereby allowed, settled, and signed by the court as and for the bill of exceptions herein.”

It is thus seen that what is settled are trial proceedings, nothing more.

Attached to the transcript is what is denominated an “entered order.” Omitting the title of the court and cause, it is:

“The attorneys for the respective parties and the jury heretofore impaneled and sworn to try the within case being now present and ready, the further trial of the case is resumed. The court having considered the defendant’s 2 motion for judgment of nonsuit and dismissal herein, and being fully advised in the premises, it is ordered that the said motion be, and it is, hereby sustained. It is ordered

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that jurors serving on the trial of the within case be, and they are, hereby discharged from further consideration of the case, and all jurors serving in this division of the court be, and they are, hereby excused to September 16, 1913, at the hour of ten o'clock a. m."

These are pointed to as constituting the judgment or recitals of it. The order is not a part of the judgment roll. Laws Utah 1911, c. 94. It is not contained in the bill, nor made a part of it, nor settled in the bill. It thus is neither part of the judgment roll nor of the bill. We therefore cannot notice it. All we have, then, is the bill. The recitals at most but show an order granting a nonsuit, or directing a judgment of nonsuit. It does not show a judgment, one in fact rendered or entered. From what is recited, it may be said the case was sent out of court. But that a judgment was in fact rendered or entered is left to argument and deduction. If a judgment was rendered and entered, it ought to appear by the court's record and the judgment book. The bill contains no such recitals; nor is such fact otherwise made to appear. It is generally admitted, but not always observed, that what ought to be of record must be proved by record and by the right record.

A judgment is the final determination of the rights of the parties. To ascertain what was in fact determined, recourse should be had, not to a bill of exceptions, but to the judgment itself, or the judgment record or recitals of 3 it. If anything ought to be shown by the right record or recitals of it, it is a judgment. That has not been done. Until so done, we cannot properly know that a judgment has been rendered or entered. For aught that now appears, no judgment was in fact rendered or entered. Were there one in fact rendered or entered, a diminution of the record could have been suggested, and what is now lacking could have been certified up. That was not asked. Instead of that, the appellant rests upon the recitals in the bill and on the extraneous order attached to the transcript. As already observed, that order cannot be noticed. We thus are asked to look through the bill to ascertain if some remark or order

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of the court was made during the trial which may be considered had the effect to send the case out of court, and call that the judgment. Such a practice but leads to useless jargon and unprofitable wrangles. If there is a judgment, there is a right way to show it. It is just as convenient to do it that way as to try to do it the wrong way. If no judgment was in fact rendered or entered, then this appeal does not lie, and a review or determination by us would be ineffectual.

We therefore think the appeal should be dismissed. Such is the order. Respondent to recover costs.

McCARTY, J., concurs.

FRICK, J.

I concur. At first blush I thought this case fell within the ruling made in *Robinson v. Salt Lake City*, 37 Utah 520, 109 Pac. 817, where we held a somewhat informal judgment of nonsuit sufficient to support an appeal. Upon a careful examination of the record in this case, I am convinced that there is no similarity between the two cases. Here no judgment of any kind is shown to have been entered, and, as stated by Mr. Chief Justice STRAUP, the order sustaining the motion for a nonsuit is not appealable in this jurisdiction; hence we are without jurisdiction to hear the appeal, and it therefore should be dismissed.

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## FERGUSON v. WINTER.

No. 2716. Decided June 25, 1915 (150 Pac. 299).

1. MUNICIPAL CORPORATIONS—COLLISION WITH WAGON—OWNERSHIP—QUESTION FOR JURY. In an action for injuries to plaintiff street sweeper by a delivery wagon, question of the ownership of such wagon *held* for the jury under the evidence. (Page 323.)
2. MASTER AND SERVANT—INJURY TO THIRD PERSON—USE OF HIGHWAY—AGENCY OF DRIVER—BURDEN OF PROOF. Where plaintiff street sweeper was injured by being run into by a horse and delivery wagon, which he affirmatively proved were not driven by or under the control of the defendant at the time of the accident, but were under the control of a third person, the burden of proof was on plaintiff to produce evidence that the driver was the servant of the defendant, acting in the course of his employment at the time of the accident, since the mere use of a wagon is not sufficient to hold the owner for injuries caused by the driver. (Page 323.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by John B. Ferguson against A. E. Winter, doing business under the name and style of the Utah Packing Company.

Judgment for defendant. Plaintiff appeals.

AFFIRMED.

*Powers & Riter* for appellant.

*W. R. Hutchinson* for respondent.

FRICK, J.

This action was brought by the plaintiff to recover damages for personal injuries which he alleged he sustained through the negligence of one of the defendant's servants while driving one of the latter's teams and delivery wagon. The plaintiff

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alleged that the defendant was engaged in the—"meat-packing business under the name and style of Utah Packing Company and in connection therewith drove delivery wagons and other vehicles over and across the streets of Salt Lake City."

The plaintiff further alleged that he was employed by Salt Lake City as a street cleaner or street sweeper, and that he was injured through the negligence of one of defendant's servants while engaged in driving one of defendant's delivery wagons on one of the streets aforesaid. The allegations of negligence are sufficient and are not assailed. The defendant in his answer admitted that portion of the complaint we have quoted above, and denied all the other allegations therein contained. At the trial the plaintiff, in substance, proved that on a certain day, while he was engaged in cleaning the streets, a young man rapidly drove a team and delivery wagon on the street, and in passing the plaintiff the young man carelessly drove the wagon against the instrumentality used by the plaintiff, and caused the same to strike and injure him; that on the sides of the wagon driven by the young man were painted the words or sign "Utah Packing Company;" that plaintiff frequently had seen the same wagon, or similar ones, driven on the streets of Salt Lake City with said sign painted on them; that after the injury he saw the wagon with the sign painted thereon standing "at the Utah Packing Company's place of business." He also testified:

"I saw the same driver down there working at the Utah Packing Company's place of business."

That is, after the accident—how long thereafter is not shown—the plaintiff saw the wagon which he claims injured him as aforesaid and the driver thereof at the place of business of the defendant. This, in substance, constitutes all the evidence produced by the plaintiff respecting the ownership of the wagon and the purpose for which it was being used at the time of the accident, including the proof of agency of the driver. Upon the foregoing evidence both parties rested and the defendant requested the court to direct the jury to return a verdict in his favor upon the grounds: (1) That the plaintiff had failed to prove the ownership of the

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Appeal from Third District.

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team and wagon; and (2) that he had also failed to prove that the driver was the agent or servant of the defendant, or that at the time of the accident he was engaged in the course of his employment. The court granted the request; and directed the jury to return a verdict for the defendant, which was done, and judgment was entered accordingly in favor of the defendant.

The plaintiff appeals, and asks us to reverse the judgment for the reason that the court erred in directing the jury to return a verdict for the defendant, and for the fur- 1, 2  
ther reason that the court erred in not submitting the case to the jury upon the evidence. We think that the proof was sufficient to take the case to the jury upon the question of the ownership of the wagon. To that effect are the cases cited by appellant's counsel. See *Pittsburg, Ft. W. & C. Ry. v. Callaghan*, 157 Ill. 406, 41 N. E. 909; *Edgeworth v. Wood*, 58 N. J. Law 463, 33 Atl. 940; *Norris v. Kohler*, 41 N. Y. 42. That was, however, not all that the plaintiff was required to prove to make a *prima facie* case against the defendant, in view of the fact that the plaintiff affirmatively proved that the team and wagon in question were not driven by, and were not under the control of, the defendant at the time the accident occurred, but were, as alleged, in the complaint, under the control of a third person. The plaintiff was thus required to produce some evidence, either direct or inferential, that the driver was the servant of the defendant, and that at the time of the accident he was acting in the course of his employment; that is, was doing something in carrying on his master's business. There is no evidence upon that subject, either direct or inferential. Merely to say that A. is using a wagon or automobile, etc., belonging to B. is not sufficient to hold B. for the alleged negligent acts of A. The great weight of authority is to that effect. Mr. Labatt, in his excellent work on Master and Servant (2d Ed.), vol. 6, section 2281, p. 6880, states the rule correctly and clearly in the following language:

"It is a well-settled rule that, 'wherever the master intrusts a horse or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will

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Ferguson v. Winter, 46 Utah 321.

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be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment.' On the other hand, it is agreed that evidence which goes no further than to show that the instrumentality by means of which, or in respect of which, a servant committed a certain tort was owned by the master, is not sufficient to establish a vicarious liability on the part of the master. Such evidence, it is obvious, is equally consistent with the inference of a loan or license, or with the inference of a user by the servant for his own purposes, without the knowledge or consent of the master."

After explaining that the injured party may prove facts from which it may be inferred that the offending agent or servant was acting within the scope of his master's business by showing that the servant was at the time doing something in connection with the master's business, such as actually delivering goods, wares, or merchandise in which the master deals, or something in connection with the master's business, etc., the author, on page 6866, further says:

"By one court, the fact of ownership has been treated as an element which is sufficient of itself to warrant the conclusion that the servant was acting in the course of his employment under the owner. But the weight of authority is decidedly opposed to this view, and it may safely be pronounced unsound."

In the case of *Sarver v. Mitchell*, 35 Pa. Super. Ct. 69, it is held that merely to prove ownership of the machine or instrumentality, in that case an automobile, is not enough to fasten liability on the owner of the machine. In the headnote the rule is stated thus:

"The plaintiff must go further and show that the machine was being used in the course of the master's business. If he fails to do this he may be properly nonsuited."

See, also, as supporting the text quoted from Labatt, *supra*, *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598, and cases there cited. We remark that we are not now passing upon what inferences might be deduced from the fact, if it were shown to be the fact, that the vehicle which caused the injury complained of was habitually used in the defendant's business for the purpose of delivering or handling goods, wares, or merchandise in which he was dealing, and that on the day of the accident, or just before it

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Appeal from Fourth District.

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occurred, the person in whose charge and control such vehicle was had started out on a trip to deliver or handle some article or articles dealt in by the defendant. It may be that under such circumstances it could be inferred that the person in charge of such a vehicle was in the employ of the defendant, and that such person was discharging some duty in the course of his employment. We have no such case here, and hence do not express an opinion upon such a state of facts. It was an easy matter for plaintiff's counsel to call the driver in question and show by him that at the time of the accident he was engaged in the course of his employment. Moreover, the defendant at least was present in court, and no reason appears why the facts could not be elicited from him.

For the reasons stated the judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

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ENGBERG v. HEBER DRUG CO.

No. 2735. Decided June 29, 1915. (150 Pac. 297.)

APPEAL AND ERROR—FINDINGS OF FACT—EVIDENCE. Findings for plaintiff will not be disturbed on appeal, in the absence of error of law, where they are supported by substantial evidence.

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Action by A. F. Engberg against the Heber Drug Company, a corporation.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

*W. S. Willes* for appellant.

*Elias Hanson* for respondent.

FRICK, J.

The plaintiff brought this action to recover a balance of \$392.35, which he alleged was due him for services rendered by him for the defendant under a certain contract which he set forth in the complaint. The defendant, in its answer to the complaint, denied all indebtedness to the plaintiff, and set up a counterclaim and demanded judgment thereon against the plaintiff for the sum of \$505. It appears from the evidence that the plaintiff is a registered pharmacist, and during the time alleged in the complaint was employed as such by the defendant company to manage its drug store and business in Heber City, Utah. At the trial it was stipulated that, according to the books of the company, it was made to appear that there was a discrepancy between the receipts and disbursements, during the period for which plaintiff was employed, amounting to the sum of \$476.06. It was accordingly contended by the defendant that, in view of the fact that plaintiff was the manager of the defendant's business, and that the same was under his charge, he should be required to account to the defendant at least for said amount, and if he were required to do that, there would be a balance due from him to the defendant. A trial to the court without a jury resulted in findings and judgment in favor of the plaintiff for the sum of \$267.38, with legal interest thereon from November 1, 1911. From that judgment defendant appeals, assigning a number of errors, most of which are directed against the court's findings, upon the ground that they are not sustained by the evidence.

According to the evidence as construed by counsel for appellant, it should have been given judgment against the respondent for the sum of \$32.48 instead of respondent being given judgment against it, as before stated. Upon the other hand, respondent's counsel insists that the evidence abundantly sustains the court's findings and judgment in favor of his client. All matters of difference between the parties seem to have been fully and fairly considered and determined by the trial court. Each party was given ample

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Writ Denied.

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opportunity to present its evidence and, as appears, did so. Nor is there a single question of law presented by the record. The whole controversy turned upon whether the court should find the issues of fact in favor of appellant's contentions or in favor of those claimed by respondent. The court ultimately found in favor of respondent, and every one of the findings is sustained, as we think, by sufficient evidence. The action being one at law, we can only examine the evidence for the purpose of determining whether the findings were supported by some substantial evidence. We think they are. This disposes of the case. The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

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MARTINEAU, Justice of the Peace, v. CRABBE et al.,  
Board of County Commissioners.

No. 2791. Decided June 29, 1915. (150 Pac., 301).

1. PROHIBITION—NATURE OF REMEDY—STATUTE. Where a justice of the peace sought prohibition to restrain the board of county commissioners from taking further action under Laws 1915, c. 108, amending Comp. Laws 1907, Sec. 544, relating to the constitution of justice courts in cities of the first class and others, and regardless of an emergency clause which the applicant contended was unconstitutional, the act would go into effect May 11, 1915, and the case was presented to the court on oral argument on May 14th, although the board had appointed a second justice under the act before it went into effect, prohibition could not issue, since under Comp. Laws 1907, Sec. 3654, the office of the writ is to arrest the proceedings of any tribunal, corporation, board, or person when such proceedings are without or in excess of the jurisdiction of the tribunal; the writ of "prohibition" being one commanding the person to whom it is directed not to do something which, by the suggestion of the relator, the court if informed he is about to do, a preventative rather than a corrective remedy, issuing only to prevent the commission of a future act. (Page 333.)
2. STATUTES—PARTIAL INVALIDITY. That Laws, 1915, c. 108, amending Comp. Laws 1907, Sec. 544, providing for the constitution of

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justice courts in precincts coextensive with cities of the first class, and the appointment of a clerk and deputy clerks of the justice courts of such precincts, was in part repugnant to Const. Art. 8, Sec. 21, providing that judges of the Supreme Court, District Courts and justices of the peace shall be conservators of the peace, and may hold preliminary examinations in cases of felony, because of the provision that all causes of criminal action, arising within cities of the first class, and over which justices of the peace have jurisdiction, shall be brought before the respective justices for such cities, did not invalidate the entire act, since the power and jurisdiction of the justice in criminal cases within his precinct had nothing to do with the power of the board of county commissioners to appoint him, while an invalid section of a statute, which may be eliminated without affecting the other provisions, will not invalidate the entire act. (Page 335.)

3. STATUTES—JUSTICE COURTS—CONSTITUTIONALITY—"SUBJECT OF A LAW." Laws 1915, c. 108, amending Comp. Laws 1907, Sec. 544, providing for the election of justices of the peace and constables in cities of the first class and others, and the appointment of a clerk and deputy clerks for justice courts by the board of county commissioners, is not violative of Const. Art. 6, Sec. 23, providing that, with certain exceptions, no bill shall be passed containing more than one subject, since all the provisions of the act relate to the constitution of two justice courts in certain precincts made coextensive with cities of the first class, and one justice in precincts coextensive with other cities, all the provisions of the act relating to its general purpose having a natural connection with the subject, while the fact that it provides for the election of constables and the appointment of a clerk and deputy clerks of the justice courts does not make it repugnant to the Constitution, since the provisions are germane to the subject of the act providing for the establishment of justice of the peace courts; the "subject of a law" being the matter to which it relates and with which it deals.' (Page 336.)
4. STATUTES—SPECIAL LAWS—SALARIES OF JUSTICES OF PEACE—"COUNTY OFFICER." Laws 1915, c. 108, amending Comp. Laws 1907, Sec. 544, providing for the constitution of justice courts in precincts coextensive with cities of the first class, one justice court in precincts coextensive with cities of 15,000 to 40,000 population, etc., and providing for the payment of a salary to the justices instead of compensation by fees as previously, is not violative of Const. Art. 6, Sec. 26, prohibiting any private or spe-

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<sup>1</sup>*Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *Salt Lake City v. Wilson*, 46 Utah, 60, 148 Pac. 1104; *Martineaux v. Cutler*, 32 Utah, 475, 91 Pac. 355.

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Writ Denied.

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cial laws regulating the jurisdiction and duties of justices of the peace, the practice of courts of justice, or county and township affairs, or creating, increasing or decreasing the compensation of public officers during their respective terms, and providing that, where a general law can be applicable, no special law shall be enacted, but that the section shall not restrict the power of the Legislature to establish and regulate the compensation and fees of county and township officers, since justices of the peace are "county officers," and are not within the provision prohibiting the Legislature from increasing or decreasing fees of a public officer. (Page 338.)

5. **JUSTICES OF THE PEACE—STATUTE FIXING SALARIES—CONSTITUTIONALITY.** Laws 1915, c. 108, amending Comp. Laws 1907, Sec. 544, providing for the constitution of justice courts in precincts coextensive with cities of the first class, and one such court in precincts coextensive with cities of 15,000 to 40,000 population, is not violative of Const. Art. 21, Secs. 1, 2, providing that all officers, except notaries public, justices of the peace, and constables, shall be paid fixed salaries, provided that city justices may be paid by salary when so determined by the city authorities, and that the Legislature shall provide by law the fees which shall be collected by all officers within the state, and that notaries public, justices of the peace, and constables, paid by fees, shall accept them as their full compensation, but that all other officers shall keep a true account of all fees collected, and pay them into the proper treasury, since, when construed with Const. Art. 6, Sec. 26, providing that nothing in that section shall be construed to deny or restrict the power of the Legislature to establish and regulate the compensation and fees of county and township officers, article 21 does not prohibit the Legislature from establishing and regulating the compensation of a justice of the peace. (Page 339.)
6. **STATUTES—SPECIAL LAWS—JUSTICES OF THE PEACE.** Laws 1915, c. 108, amending Comp. Laws 1907, Sec. 544, and providing for the constitution of justice courts in cities of the first class and that such justices shall be attorneys at law, is not totally invalid because violative of Const. Art. 6, Sec. 26, providing that, in all cases where a general law can be applicable, no special law shall be enacted, as fixing a different standard of qualifications for first-class cities than for justices in other precincts. (Page 340.)
7. **STATUTES—SPECIAL LAWS—"DUTY"—JUSTICES OF THE PEACE.** Laws 1915, c. 108, amending Comp. Laws 1907, Sec. 544, providing for the constitution of justice courts in precincts coextensive with cities of the first class, and others, and providing that the board of county commissioners shall appoint a clerk and deputy clerks for those precincts, is not violative of Const. Art. 6,



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Sec. 26, subd. 4, prohibiting the Legislature from enacting any special laws regulating the jurisdiction and duties of a justice of the peace, since the term "duties," as used, comprehends only judicial acts, and such ministerial acts as justices must perform in their official capacity, and do not include the routine details of merely clerical character which clerks perform. (Page 340.)

Application for writ of prohibition by L. R. Martineau, Jr., Justice of the Peace, against A. H. Crabbe and others, Board of County Commissioners of Salt Lake County.

WRIT DENIED.

*Ray Van Cott* for plaintiff.

*Harold Fabian* and *Herbert Van Dam, Jr.*, Assistant County Attorney, for defendant.

#### STATEMENT OF FACTS.

This is an application by plaintiff, L. R. Martineau, Jr., for a writ of prohibition against defendants, the county commissioners of Salt Lake County. The action involves the validity of chapter 108, Session Laws Utah 1915, which is as follows:

"An act amending section 544, chapter 5 of the Compiled Laws of Utah, 1907, relating to justices of the peace and constables in cities of the first class, and providing that causes of action arising within the limits of such cities be commenced and tried before such justices, fixing the qualifications and salaries of such justices, providing for a clerk and deputy or deputies and for the disposition of the fees of such justices' courts.

"Be it enacted by the Legislature of the state of Utah:

"Section 1. That section 544, chapter 5 of the Compiled Laws of Utah, 1907, be, and the same is hereby amended to read as follows:

"The officers of a precinct are one justice of the peace and one constable, except as otherwise herein provided. The board of county commissioners, as public convenience may

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Writ Denied.

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require, shall divide their respective counties into precincts for the purpose of electing justices of the peace and constables: Provided, that cities of the first class of 40,000 or more inhabitants, shall not be divided into precincts for the purpose of electing precinct officers, but such cities shall be deemed one precinct for the purpose of electing two justices of the peace and two constables therefor, and that cities having a population of more than 15,000 and less than 40,000 inhabitants shall be deemed one precinct for the purpose of electing one constable therefor and for the purpose of providing a justice of the peace; therefor, but no justice of the peace shall be elected therein, and the municipal judge of such cities shall be ex officio precinct justices therefor: Provided further, that no person shall act as justice of the peace in cities of the first class unless such person has first been regularly admitted by the Supreme Court of Utah to practice as an attorney at law in the courts of this state.

“That within thirty days after the passage of this act, it shall be the duty of the county commissioners of the county within which cities of the first class of 40,000 or more inhabitants are located to appoint one justice of the peace and one constable to serve in such cities until the next ensuing general election, and until their successors are duly elected and qualified.

“That all causes of criminal action, arising within the limits of cities of the first class of 40,000 or more inhabitants and over which justices of the peace have jurisdiction, shall be brought before the respective justices of the peace in and for such cities of the first class where the causes of action arise: Provided, however, that nothing in this section shall be construed to restrict or in any way affect the jurisdiction of any city or municipal court as at present constituted.

“The annual salaries of justices of the peace in cities of the first class of forty thousand or more inhabitants shall be twenty-four hundred dollars each, payable monthly out of the county treasury of the county in which such cities are located.

“All acts and parts of acts in conflict herewith are hereby repealed.

"The county commissioners of the respective counties within which cities of the first class of forty thousand or more inhabitants are located, shall appoint a clerk of the court of the justice of the peace and such deputy clerks as they may deem necessary, and shall fix the compensation of such officers.

"It shall be the duty of the clerk of said court to act as custodian of all the files, papers, indexes and dockets of justices of the peace within said cities of the first class, and the said clerk shall be responsible for the care and safe keeping of all such records and shall collect all fees as provided by law for justices of the peace and shall turn the same into the country treasury monthly.

"This act shall take effect upon approval.

"Approved March 22d, 1915."

It is admitted that plaintiff was on November 3, 1914, duly elected to the office of justice of the peace for Salt Lake City precinct, and that on January 4, 1915, he duly qualified and entered upon the administration of the duties of the office and ever since has administered, and still continues to administer, the same. It is also admitted that defendants, as county commissioners, in pursuance of the provisions of the foregoing enactment, at a meeting held on April 14, 1915, appointed Brigham Clegg to the office of justice of the peace for Salt Lake precinct and one Clifford Naylor to the office of "clerk of the court of justice of the peace" for said precinct, said appointees to hold and to continue in said office until the next general election and until their successors are duly elected and qualified. Plaintiff, however, alleges that on March 8, 1915, the date of the final passage of chapter 108, known as "Senate Bill No. 200," the "emergency clause" was stricken out, and that the enactment thereby did not take effect immediately upon approval, and that the same could not take effect until May 11, 1915, sixty days after the adjournment of the session of the Legislature at which the enactment was passed. It is further alleged that the defendants, as county commissioners, "will on or after the 11th day of May, 1915, upon discovery of the fact as to when

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Writ Denied.

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said pretended enactment takes effect, proceed to appoint some persons to the respective offices hereinbefore set forth, \* \* \* and will require the clerk of said court to collect all fees as provided by law for affiant (plaintiff) and \* \* \* to turn the same into the country treasury monthly \* \* \* and will seek to compel affiant to accept the salary prescribed in said enactment as full compensation for the performance of his duties as such justice of the peace unless prohibited," etc., from so doing.

McCARTY, J. (after stating the facts as above).

The first question presented relates to the "emergency clause" of the act in question, which provides that "this act shall take effect upon approval." It is contended 1 that the Senate Journal shows that this clause was stricken from the act just before its final passage, and that therefore, under section 25, art. 6, of the Constitution, the enactment did not take effect until May 11, 1915, 60 days after the adjournment of the Legislature. This section of the Constitution provides that:

"All acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjournment of the session at which it passed, unless the Legislature by a vote of two-thirds of \* \* \* each house shall otherwise direct."

It is contended on behalf of defendants that the act containing the emergency clause, having been engrossed, approved, signed, enrolled, and deposited with the secretary of state, implies absolute verity and should be accepted as the very bill adopted by the Legislature, and that the journal of the Legislature cannot be looked to for the purpose of attacking the manner of its enactment. While a question is thus presented that is not free from doubt, it is nevertheless, so far as the issues here involved are concerned, academic only. One of the essential allegations of the petition by which the action of this court is invoked in this proceeding is:

"That defendants will on and after the 11th day of May,

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1915, upon discovery of the fact when said pretended act takes effect, proceed to appoint some persons to the respective offices," mentioned in the act.

The prayer of the petition is in part as follows:

That the defendants "be absolutely and forever restrained and prohibited from taking any further proceedings in said \* \* \* matter, or doing any of the acts or things hereinbefore complained of," etc.

It will thus be observed that the action of this court is invoked to prohibit defendants from doing certain things set forth in the petition, and not for the purpose of reviewing and correcting some alleged error based on a past transaction. The office and function of the writ of prohibition is to—

"arrest the proceedings of any tribunal, corporation, board or person \* \* \* when such proceedings are without or in excess of the jurisdiction of such tribunal," etc. Comp. Laws 1907, section 3654.

"The writ, \* \* \* as its name imparts, is one which commands the person to whom it is directed not to do something by which, by the suggestion of the relator the court is informed he is about to do. If the thing he already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act." Spelling, Ext. Relief, Sec. 1720.

In High's Ext. Legal Rems, section 766, the author says:

"Another distinguishing feature of the writ is that it is a preventative rather than a corrective remedy and issues only to prevent the commission of a future act and not to undo an act already performed."

See, also, 32 Cyc. 603.

Therefore the allegation in the petition that defendants, on the 14th day of April, A. D. 1915, in pursuance of the act in question, "did appoint one Brigham Clegg to the alleged office of justice of the peace \* \* \* and one M. W. Earl to the alleged office of constable," etc., can be considered as matters of inducement only. It appears that the act in question, regardless of the emergency clause, went into effect May 11, 1915. The case was presented to this

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Writ Denied.

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court on oral argument May 14, 1915. It will therefore be observed that, if the enactment in other respects is valid, the defendants are authorized and empowered under the act to do the things which plaintiff by this writ seeks to prohibit them from doing. As stated, the question of whether defendants were authorized in making the appointments mentioned prior to May 11, 1915, is, so far as this case is concerned, academic only, and we refrain from expressing an opinion thereon.

It is also contended that section 544x1 of the act providing that "all causes of criminal action, arising within the limits of cities of the first class of 40,000 or more inhabitants and over which justices of the peace have jurisdiction, 2 shall be brought before the respective justices of the peace in and for such cities," is in conflict with section 21, art. 8, of the Constitution, which provides that "Judges of the Supreme Court, district courts, and justices of the peace, shall be conservators of the peace, and may hold preliminary examinations in cases of felony." While section 544x1 is apparently in conflict with and repugnant to this provision of the Constitution (and in the opinion of the writer clearly so), yet we fail to see how or wherein the question is necessarily involved. It relates to the power and jurisdiction of the justice (whether his jurisdiction in criminal cases arising within the precinct for which he is appointed is exclusive or concurrent), but had nothing to do with the power of the commissioners to appoint a justice and in no manner relates to that question. The power and authority of the commissioners to appoint a justice of the peace is one thing. The power and jurisdiction which the justice may lawfully exercise is wholly a different thing. Assuming, however, for the sake of argument, that this section of the statute is invalid, it does not render nugatory the entire act. The section is separable and distinct from the balance of the act, and can be eliminated therefrom without in any way affecting the other provision.

Another objection urged against the validity of the act in question is that it violates section 23 of article 6 of the

Constitution of this state, which, so far as material **3**  
here, provides:

“Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject. \* \* \*

We think the objection is unsound. Manifestly the purpose of this provision of the Constitution is to prevent the Legislature from intermingling in one act two or more separate and distinct propositions—things which, in a legal sense, have no connection with, or proper relation to, each other. The reasons for, and the scope of, constitutional provisions of this character, are well illustrated in 26 A. & E. Ency. L. (2d Ed.) 575, in the following language:

“This requirement of singleness is not intended to embarrass honest legislation, but only to prevent the vicious practice of joining in one act incongruous and unrelated matters; and if all the parts of a statute have a natural connection and reasonably relate, directly or indirectly to one general and legitimate subject of legislation, the act is not open to the objection of plurality, no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose.”

It will be noticed from a casual reading of the act that its purpose (general object) is to provide two justice of the peace courts in certain precincts that are made co-extensive with cities having a population of 40,000 or more inhabitants and one justice of the peace court in precincts that are coextensive with cities having more than 15,000 and less than 40,000 inhabitants. All of the provisions of the act relate and are germane to its general purpose. They have a natural connection with the subject, namely, providing for and establishing justice of the peace courts in the classes of precincts therein mentioned. The fact that the act provides for the election of two constables in precincts coextensive with cities of the first class of 40,000 or more inhabitants and the appointment of a clerk and deputy clerks of “the court of the justice of the peace” of such precincts does not make it repugnant to the provision of the Constitution above set forth. These provisions are parts of, and are germane to, the subject of the act, namely, providing and establishing

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Writ Denied.

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justice of the peace courts for this class of precincts. In the case of *Herbert v. Baltimore County Comr's*, 97 Md. 639, 55 Atl. 376, the court, construing an almost identical constitutional provision, said:

"The law relating to and regulating the duties of justices and constables had been always considered as one subject, and has been so treated in the Constitution of the state and the local law itself."

The Supreme Court of Alabama, in applying a similar constitutional provision to a statute as broad, if not broader than our own, said, referring to the statute:

"Every provision of the act is so plainly germane and cognate to the general subject of establishing the court and defining its powers and jurisdiction that we will make no further comment. *Hawkins v. Roberts*, 122 Ala. 130, 144, 27 South. 327, and authorities there cited. We feel no hesitation in holding the act to be constitutional." *State v. Abernathy*, 40 South. 353.

The Constitution of South Dakota contains the following provision:

"No law shall embrace more than one subject which shall be expressed in its title."

The Supreme Court of that state, in a well considered opinion (*State v. Morgan*, 2 S. D. 32, 48 N. W. 314), says:

"Whatever may be the scope of (an) act, it can embrace but one subject, and all its provisions must relate to that subject. They must be parts of it, incident to it, or in some reasonable sense auxiliary to the object in view. This constitutional requirement is addressed to the subject, not to the details, of the act. That subject must be expressed in the title. The subject must be single. The provisions to accomplish the object involved in that subject may be multifarious. \* \* \* The Constitution authorizes one subject, and any number of matters, provided they have any natural or logical connection with each other in legislation."

And again:

"There is no constitutional restriction as to the scope or magnitude of the single subject of a legislative act."

In the case of *Marionaux v. Cutler*, 32 Utah 475, 91 Pac. 355, it was contended that salary and mileage of a judge were different subjects, and hence could not be joined in the same act. This court, speaking through Mr. Justice Frick, said:

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"We need not discuss at length the reasons why salary or compensation and mileage may be one subject within the purview of the Constitution. That, as abstract propositions, they may be two subjects, cannot well be questioned. It is equally apparent that for legislative purposes, in fixing the compensation of officers, they may quite as naturally form but one subject."

*Edler v. Edward*, 34 Utah 13, 95 Pac. 367; *Salt Lake City v. Wilson*, 46 Utah 60, 148 Pac. 1104; *Messenger v. Teagan*, 106 Mich. 654, 64 N. W. 499; *Clark v. Black*, 136 Ga. 812, 72 S. E. 251; *Conner v. Mayor, etc., of New York*, 5 N. Y. 297; 7 Words and Phrases, 6708-6710, and volume 4, New Series, 731; *State v. Fontenot*, 132 La. 481, 61 South 534, Ann. Cas. 1915A, 76.

We also invite attention to an elaborate note to the last cited case, commencing on page 79, Ann. Cas., in which decisions are cited bearing on practically every question raised in the case at bar.

The validity of the act is also challenged on the ground that it is in contravention of the following provisions of section 26 of article 6 of the Constitution, 4  
namely:

"The Legislature is prohibited from enacting any private or special laws in the following cases: \* \* \* (4) Regulating the jurisdiction and duties of justices of the peace. \* \* \* (6) Regulating the practice of courts of justice. \* \* \* (11) Regulating county and township affairs. \* \* \* (18) Creating, increasing or decreasing fees, percentages or allowances of public officers during the term for which said officers are elected or appointed. \* \* \* In all cases where a general law can be applicable, no special law shall be enacted."

The concluding paragraph of this section provides that:

"Nothing in this section shall be construed to deny or restrict the power of the Legislature to establish and regulate the compensation and fees of county and township officers."

We are clearly of the opinion that justices of the peace are, in the meaning of the law, county officers (18 A. & E. Ency. L. [2d Ed.] 10; *Ballantyne v. Bower*, 17 Wyo. 356, 99 Pac.

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Writ Denied.

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869, 17 Ann. Cas. 82; 2 Words and Phrases, 1663, volume 1, New Series, 1101), and hence do not fall within the provision of section 26, *supra*, prohibiting the Legislature from "creating, increasing or decreasing fees, percentages or allowances of public officers," etc.

It is contended that the act violates the provisions of article 21 of the Constitution.

Section 1 is as follows:

"All state, district, city, county, town and school officers, excepting notaries public, boards of arbitration, court commissioners, justices of the peace and constables, shall be paid fixed and definite salaries: Provided, that 5 city justices may be paid by salary when so determined by the mayor and council of such cities."

Section 2, so far as material here, provides that:

"The Legislature shall provide by law the fees which shall be collected by all officers within the state. Notaries public, boards of arbitration, court commissioners, justices of the peace, and constables paid by fees, shall accept said fees as their full compensation. But all other state, district, county, city, town and school officers, shall be required by law to keep a true and correct account of all fees collected by them, and to pay the same into the proper treasury."

These provisions should be read and construed in connection with the provisions of section 26, art. 6, herein set forth, and particularly with the concluding paragraph thereof, which provides that nothing in that section "shall be construed to deny or restrict the power of the Legislature to establish and regulate the compensation and fees of county and township officers." We do not think the provisions, when so read and construed, prohibit the Legislature from establishing and regulating the "compensation and fees" of justices of the peace and other county officers. The act, therefore, cannot be successfully assailed on the ground last mentioned.

Another objection urged against the validity of the act is that it provides that persons who have not been admitted by this court to practice as attorneys at law in the courts

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of this state are not eligible to hold the office of justice 6  
of the peace in cities of the first class. It is contended  
that the act in this regard is special legislation and violates  
the provision of the Constitution, which provides that:

“In all cases where a general law can be applied no special  
law shall be enacted.”

There is much force to plaintiff's contention that, in pre-  
scribing the qualifications of justices of the peace, a general  
law on the subject would be applicable, and that an act fix-  
ing a different standard of qualifications for justices of the  
peace in precincts coextensive with cities of the first class  
from that required of justices of the peace in other precincts  
is in derogation of this provision of the Constitution. Con-  
ceding, without deciding, that the act in that regard is void,  
it does not necessarily follow that the entire act must be  
so declared. The board of county commissioners may never-  
theless appoint some person to the office who, in its judgment,  
is suitable for the position, and, if perchance it should appoint  
some person who has not been regularly admitted by this  
court to practice in the courts of this state, the right of  
such person to hold the office might, in a proper proceeding,  
be challenged. It must be conceded that, if the law were  
silent respecting the qualifications a person must possess in  
order to be eligible to hold the office, the board of county  
commissioners might very properly appoint a person who has  
been regularly admitted to practice before the courts of this  
state. We therefore deem it unnecessary on this occasion to  
decide or further consider the question.

It is also contended that the appointment of a clerk and  
deputy clerks, as provided in section 544x4 of the act, regu-  
lates the duties of justices of the peace in precincts  
coextensive with cities of the first class containing 7  
40,000 or more inhabitants, and relieves such justices  
from performing certain duties required of justices of the  
peace in all other precincts throughout the state; and that  
this discrimination violates the provisions of the Constitu-  
tion (subdivision 4, section 26, art. 6), prohibiting the Legis-  
lature from enacting any “special laws \* \* \* regulating

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the jurisdiction and duties of justice of the peace." The term "duties," as here used in the Constitution, we think, comprehends only the judicial acts and such ministerial acts as justices of the peace are required to perform in their official capacity, and do not include such acts and services as are merely clerical in character and as are usually performed by a clerk or an amanuensis; and hence the act cannot be successfully assailed on the ground that it is in conflict with the provisions of the Constitution last referred to.

The writ is denied. Costs to defendants.

STRAUP, C. J., and McCARTY, J., concur.

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STATE v. HILLSTROM.

No. 2764. Decided July 3, 1915. (150 Pac. 935.)

1. CRIMINAL LAW—TRIAL—INFERENCES FROM EVIDENCE—FUNCTION OF JURY. The drawing of inferences from facts in evidence is for the jury. (Page 345.)
2. CRIMINAL LAW—APPEAL—QUESTIONS REVIEWABLE—CREDIBILITY OF WITNESSES. The credibility and weight of the testimony of a witness was for the jury, not for the appellate court. (Page 345.)
3. CRIMINAL LAW—EVIDENCE—ADMISSION—SILENCE OF DEFENDANT. Where defendant, when in custody charged with murder, declined to give the officer any information in regard to the quarrel over a woman in which he claimed to have received a shot through the body, or to make any statement whatever concerning the matter, his refusal to make any such statements in answer to the officer's offer to set him free if he would do so, or his refusal to answer any question, could not be considered as an admission of guilt. (Page 345.)
4. CRIMINAL LAW—EVIDENCE—PRIVILEGE OF ONE ACCUSED OF CRIME. The failure of a defendant in a criminal case to take the stand cannot in any manner prejudice him, or be used against him, but the defendant, without some proof tending to rebut proven facts within his knowledge, may not avoid the natural and usual inferences deducible from them by merely declining to take the stand. (Page 345.)
5. CRIMINAL LAW—TRIAL—REQUISITE PROOF OF GUILT. In a prose-

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cution for homicide, the state, as in all criminal cases, must prove the defendant guilty beyond a reasonable doubt. (Page 345.)

6. **HOMICIDE—TRIAL—IDENTITY—SUFFICIENCY OF EVIDENCE.** In a prosecution for first degree murder, evidence as to the identity of defendant with the victim's assailant *held* sufficient to sustain verdict of guilty.<sup>1</sup> (Page 345.)
7. **AMICUS CURIAE—TRIAL—DISCHARGE OF COUNSEL.** In a prosecution for homicide, defendant was represented by two counsel of his own selection. When the state was about half through with its case, upon a witness being tendered for cross-examination, the defendant arose, stated that he had three prosecuting attorneys and intended to get rid of two of them, and told his counsel they were fired. After a colloquy, defendant insisting on his right to conduct his own case, the court said he might do so, but appointed defendant's attorneys *amici curiae* to conduct examinations for him and protect his interests. Thereafter both defendant and the attorneys cross-examined witnesses, and such attorneys elicited matter beneficial to defendant. After a noon-hour conference with his friends and the attorneys defendant returned to court and stated he was willing the attorneys should ask questions, and that he himself would also examine the witnesses. Thereafter other counsel came into the case for defendant, and all three attorneys, with defendant's consent, represented him and took part in all proceedings to the end of the trial. Defendant contended that the court erred in appointing his counsel *amici curiae* after he had discharged them, in refusing to allow him to conduct his case in person and alone without counsel, in not taking an adjournment at once after he had discharged his counsel to enable him to procure other counsel, and in proceeding against him without counsel. *Held* that, since the court granted all defendant asked, his right with or without cause to discharge counsel and defend in person, he not having asked for other counsel, or for time to procure them, but in a most unseemly manner, without cause, abruptly demanded the discharge of his counsel when damaging testimony was being elicited against him, the action of the court in appointing such counsel *amici curiae* to protect defendant's interests was entirely proper. (Page 359.)
8. **CRIMINAL LAW—EVIDENCE—TESTIMONY ON PRELIMINARY EXAMINATION—STATUTES.** Comp. Laws 1907, section 4670, provides that in case of homicide the evidence at the preliminary examina-

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<sup>1</sup>*State v. Hill*, 44 Utah, 79, 138 Pac. 1149; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562; *State v. Sirmay*, 40 Utah, 525, 122 Pac. 748; *State v. Inlow*, 44 Utah, 485, 141 Pac. 530; *State v. Thorne*, 39 Utah, 208, 117 Pac. 58.

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tion must be reduced to writing as a deposition, and that the transcript of such evidence, properly certified and filed, shall be *prima facie* a correct statement of the testimony; while section 4685x1, provides that it may be used at the trial with the in proceeding against him without counsel. *Held* that, since the same effect as though the witness were testifying, if it be satisfactorily shown to the court that the witness is dead, insane, or cannot with due diligence be found within the state. The transcript of testimony of a physician on preliminary examination was sought to be used at a trial for first degree murder on the ground that he could not with due diligence be found in the state. The officer who had attempted to subpoena him testified that ten days before the trial he had called at the doctor's house, but found him out making a call, but the next time they told him that the witness was going on a trip, and that before he could get him the next time he had left the state. *Held*, that the transcript of the doctor's testimony on preliminary examination was admissible in evidence; due diligence having been shown. (Page 366.)

9. **CRIMINAL LAW—EVIDENCE—TESTIMONY ON PRELIMINARY EXAMINATION—STATUTES.** Under Comp. Laws 1907, sections 4670, 4685x1, regulating the introduction in evidence on a trial for homicide of the transcript of testimony on preliminary examination of a witness who is dead, insane, or unable to be found within the state by due diligence, where the stenographer's transcript of the proceedings at such examination showed that the defendant was present and was given opportunity to cross-examine a medical witness out of the state at the time of the trial, whose testimony on preliminary examination was sought to be introduced in evidence, such transcript was not inadmissible as denying the defendant an opportunity to cross-examine the witness in the presence of the trial jury. (Page 366.)
10. **CRIMINAL LAW—EVIDENCE—TRANSCRIPT ON PRELIMINARY EXAMINATION—STATUTE.** Under Comp. Laws 1907, sections, 4670, 4685x1, proving that in cases of homicide the testimony of witnesses on preliminary examination shall be transcribed by a stenographer, certified, and filed, and that such transcript may be used at the trial as evidence if the witness be dead, insane, or not, with due diligence, to be found within the state, such a transcript was not inadmissible because the certificate to the transcript was to the effect that it was transcribed in longhand, while in fact, it was transcribed in typewriting. (Page 366.)
11. **HOMICIDE—HARMLESS ERROR—RECEPTION OF INADMISSIBLE TESTIMONY.** In a prosecution for homicide, where empty shells and bullets with which the two victims were killed were, without controversy, thirty-eight caliber, and shot from a thirty-eight

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- caliber automatic pistol, the admission of opinion evidence of a medical witness not properly qualified on the subject that, in his opinion, a wound through one of the bodies was made by a thirty-eight caliber bullet, was harmless. (Page 368.)
12. **JURY—TRIAL—EXAMINATION OF VENIREMAN.** In a prosecution for homicide, where a venireman testified in response to questions that he presumed defendant was innocent, that the state was required to prove guilt beyond a reasonable doubt, that the jury was the sole judge of guilt or innocence, etc., the action of the court in sustaining objections to questions as to whether the venireman understood he was partly interested in the defendant's side of the case on account of the presumptions of innocence, and whether he understood that a juror is under no obligations to take the opinion of any witness, was not erroneous, since the matter had been covered. (Page 369.)
  13. **CRIMINAL LAW — TRIAL — INSTRUCTIONS — CREDIBILITY OF WITNESSES.** In a prosecution for murder, an instruction that, if the jury believed any witness willfully testified falsely to a material fact, his testimony might be disregarded in whole or in part, except as he might have been corroborated by credible witnesses or evidence in the case, was not erroneous as not correctly guiding the jury as to the rules of law in determining the credibility to be given the testimony of witnesses. (Page 369.)
  14. **CRIMINAL LAW—TRIAL—INSTRUCTIONS—INSTRUCTIONS SUBSTANTIALLY GIVEN.** The refusal of requested charges substantially given is not erroneous. (Page 369.)
  15. **CRIMINAL LAW—TRIAL—INSTRUCTIONS—CIRCUMSTANCES OF SUSPICION.** In a prosecution for homicide, an instruction that circumstances of suspicion, if they amount to no more than suspicion, are not sufficient proof of guilt, was not erroneous as telling the jury that circumstances of suspicion are evidence. (Page 369.)
  16. **CRIMINAL LAW — INVITED ERROR — REQUESTED CHARGE.** Where claimed objectionable language in an instruction was taken from one of defendant's requests, he could not complain. (Page 369.)

Appeal from District Court, Third District; Hon. *M. L. Ritchie*, Judge.

Joseph Hillstrom was convicted of murder. He appeals.

**AFFIRMED.**

*O. N. Hilton* and *Soren Christensen*, for appellant.

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*A. R. Barnes*, Attorney-General, and *E. V. Higgins* and *G. A. Iverson*, Assistant Attorneys-General, for the State.

**STRAUP, C. J.**

The defendant was convicted of first degree murder and appeals. The principal question presented is that of sufficiency of the evidence. The claim made is that there is not sufficient evidence to identify the defendant, to connect him with the commission of the offense, nor to show motive.

In the information it is charged that he with a revolver shot and killed J. G. Morrison. The deceased was conducting a grocery store at or near the corner of Eighth South and West Temple streets, in Salt Lake City. The 1-6 store, with a glass front, faced east on West Temple street, running north and south. About half a block to the west is a cross-street known as Jefferson street. Midway between that street and West Temple is an alley. The homicide was committed in the store between nine forty-five and ten o'clock p. m., on the 10th day of January, 1914. With the deceased in the store were his two sons, Arling, about seventeen, and Merlin, about thirteen years of age. The night was a bright, moonlight night. Near the store was an electric arc light. There was another near Jefferson street. The sidewalk and the street near the store were also lighted from brilliant lights in the store. As the deceased and his two sons were preparing to close the store, two men with red bandana handkerchiefs over their faces as masks, and with revolvers in their hands, suddenly entered the store. One of them was tall and slender, and wore a dark, or dark grey, soft hat, and a dark coat and dark trousers. The deceased was near a counter on the north side of the room, moving a sack of potatoes behind the counter. Arling was on the south side, sweeping near a cash register and an ice chest. In the upper part of the chest, from which the door was removed, the deceased kept a loaded, six-chamber, thirty-eight caliber revolver. Merlin, the only living witness to the shooting, testified that as the two assailants entered the store and approached his father they said, "We have got you



now," and immediately shot. He gave it as his best judgment that about seven shots in all were fired, when the assailants fled, without attempting to take anything from the cash register or elsewhere. The father and Arling were both killed. The former was shot twice; the latter three times, twice in the back. Later five or six bullets and empty cartridges were found in the store. They all were shot from a thirty-eight caliber automatic revolver. Two bullet marks were found in shelving or the counter where the deceased was killed, another on the inside of the ice chest, where the deceased kept his revolver, and two or three where lay the body of Arling, behind the counter, with one bullet hole through his body and straight down through the floor. Merlin testified he did not see the first shot fired, which hit his father, but saw the second, which was shot by the taller of the two assailants, who then directed his attention towards the ice chest. Merlin retreated into a little storeroom, where he no longer saw Arling nor the assailants, but heard shots. After the assailants had fled, Merlin first went to his father, and then to Arling. He found the latter dead behind the south counter, and but a short distance from the ice chest. Near his outstretched hand lay the revolver which was kept in the ice chest, with one chamber discharged. An officer who examined it shortly thereafter testified that it was freshly discharged. Merlin testified that he saw the revolver in the ice chest earlier that evening, and that then all six chambers were loaded. He testified that he did not see Arling get the gun from the chest, and did not know that he had discharged it until he found it lying on the floor with one chamber discharged. From this it is quite evident that at some period during the shooting Arling went to the ice chest, got the gun, and discharged it at the assailants.

Another witness whose attention was attracted by the shooting saw the taller of the two assailants come out of the store in a rather stooped position, with his hands drawn over his chest, and heard him exclaim as if in great pain, "Oh, Bob!" and saw him cross the street to the alley, where he was joined by two other men. They there halted for a moment and disappeared in the alley. Another witness saw the

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taller of the two assailants run from the store into the street near a pole, there halt, and then go towards the alley, and heard him in a clear voice say, "I am shot." The next morning a gob of blood about the size of a quarter spattered over the sidewalk for a space of about a foot was found at the entrance of the alley. The blood had the appearance, as described by the witnesses, as coughed up and spat on the sidewalk. Similar blood was found down the alley where the assailants went and were heard to mutter to themselves.

The defendant on the day of the homicide was visiting with acquaintances by the name of Eselius, at Murray, a town about five miles south of the place of the homicide. At that house were Mrs. Eselius, her six brothers, her father, and one Otto Applequist. Some of them had been working at the mills or smelters at Murray. On the day of the homicide some of them left Murray about five o'clock p. m. to attend a theater at Salt Lake City. The defendant and Applequist remained. They were seen at the Eselius house as late as six o'clock that evening. They left that evening some time between six and nine; the exact time is not made to appear. Applequist did not return, and has not been seen nor heard of since. That night between eleven thirty and twelve o'clock the defendant called at a Dr. McHugh's office, on Fourteenth South and State streets, about two and one-half miles south of the place of the homicide, and about midway between the place of the homicide and Murray. The doctor had just retired. He was called to his office by the defendant ringing the bell. The doctor was acquainted with him, and had known him as "Joe Hill." Upon the doctor entering the office and asking what the trouble was, the defendant replied that he was shot, and stated: "I wish this kept private." The doctor removed the defendant's clothes, and found him suffering from a gunshot wound through the chest and lungs. As the doctor described it: "The bullet entered a little below and a little to the outer side of the nipple line, ranging upward, backward and outward, and emerged a little below the interior angle of the scapula." He found the defendant's undershirt and shirt saturated with blood, and the de-

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fendant in a weakened condition, almost ready to collapse from loss of blood. As the doctor was attending the defendant, a Dr. Bird, residing at Murray, passing Dr. McHugh's office, and seeing a light in the office, stopped to see Dr. McHugh on other matters. Dr. Bird also saw the wound. The bullet had gone clear through the defendant's body and clothes and was missing. From the appearance of the wound the doctors gave it as their opinion that the bullet causing the wound was shot from a thirty-eight caliber gun. They further testified that such a wound would cause internal hemorrhages, coughing, and spitting of blood. After the wound was attended the doctors assisted the defendant in dressing. In doing that, a revolver in a holster with shoulder straps fell from the defendant's clothes to the floor. Dr. McHugh picked it up and handed it to the defendant. He put it in his coat pocket. The doctors saw but the handle of the gun sticking out of the holster. From the appearance of the handle they gave it as their opinion that the gun was a thirty-eight caliber automatic gun, and that the handle was similar to a Colt's automatic thirty-eight gun exhibited to them. While the defendant was there at the office he told the doctors that "he had had a quarrel with some one over a woman, and that in the quarrel he was shot, and that he was as much to blame as the other fellow, and wanted it kept quiet, kept private." That was all that was said by him concerning the manner in which he received the wound. That was volunteered by him. The doctors did not ask him anything concerning the place nor the circumstances or particulars under which he received it, nor did the defendant tell them anything further about it. After the wound was dressed and the defendant ready to leave, Dr. McHugh asked Dr. Bird to take the defendant in Dr. Bird's automobile to the Eseliuses. As Dr. Bird and the defendant approached the Eselius place the defendant requested the doctor to turn down the lights of the automobile. Dr. Bird did so. As they neared the house the defendant, "with a combination of the teeth, tongue, and lips, gave two shrill, penetrating whistles." Dr. Bird assisted the defendant to the kitchen or back door. As the defendant and Dr. Bird entered "a num-

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ber of men seemed to have just gone from the back room that we first entered into the next room, and all were standing or walking in that direction as we entered the door, and turned and recognized the defendant, and, seeing him with me, expressed surprise, and asked if he was hurt." The doctor assisted the defendant to a cot into an adjoining room, and there left him sitting on the cot. Two or three days after that the defendant was arrested. In his room on a table was found a red bandana handkerchief similar to that worn by the assailants. The defendant's coat and clothing worn by him on the night of the homicide were seized and put in evidence. They were similar in appearance to those worn by the taller assailant. One of the officers asked the defendant where his gun was. He told him that Dr. Bird, on the way from Dr. McHugh's office to the Eseliuses, had trouble with his automobile, and as Dr. Bird got out to crank it, the defendant threw the gun away. No gun was found. The defendant was not a witness in the case, and at no time explained or offered to explain the place where, nor the circumstances under which, he received his wound, except as stated by him to the doctors, that he received it in a quarrel over a woman; nor did he offer any evidence whatever to show his whereabouts or movements on the night of the homicide.

A Mrs. Seeley, living about a block from the deceased's store, testified that she and her husband, returning from uptown just a few minutes prior to the homicide, passed the store and saw the deceased and his two sons in the store. As they crossed Jefferson street they met two men with red bandana handkerchiefs tied around their necks. One of the men was tall and slender. In passing they crowded her off the sidewalk. She turned and looked at them. The taller turned and looked at her. She gave this description of him:

"By the District Attorney: Q. Did this man that turned, the taller of the two, did he look directly at you? A. Yes. Q. And did you look directly at him? A. Yes. Q. Did you notice anything peculiar about the features of the face of the man that turned at that time and looked at you after you had just been crowded off the sidewalk? A. Yes. Q. I wish you would just tell in your own way, Mrs. Seeley, what

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there was about the face of that man that attracted you. A. Well, his face was real thin; he had a sharp nose, and rather large nostrils. He had a defection on the side of his face or neck. Q. On the side of the face or neck? A: Right here on his face. Q. What do you mean by that—apparently a scar? A. Yes; it looked as though it might be a scar. Q. And you observed that? A. Yes, sir. \* \* \* Q. Did the nose appear to be particularly sharp that you saw on the tall man there at that time? A. Yes. Q. And the nostrils were peculiar? A. Yes; the gentleman that I met was a sharp-faced man with a real sharp nose, and his nostrils were rather large.”

The witness, after testifying that she saw and observed the defendant shortly after his arrest, was further asked:

“Q. How does the height of the defendant compare with the height of the man that turned and looked at you? A. Very much the same. Q. How does the nose of Mr. Hillstrom compare with the nose of the man you looked at there? A. Very much the same. Q. How do the marks, especially upon the left-hand side of his face and neck, that you have had an opportunity to observe, correspond with the marks on the man that you saw there at that time? A. Well, they look a great deal alike to me, as on the same man that I saw.”

The witness at the preliminary examination and on cross-examination testified that she would not say positively that the defendant was that man, and that she had an honest doubt as to whether they were the same person.

Merlin testified that the size of the defendant was similar to that of the tall man who entered the store, but he, too, would not testify that it was the same man. The witnesses who saw the taller of the two men run out of the store and to the alley, and heard him exclaim, “Oh, Bob!” and “I am shot,” testified that they saw the defendant shortly after his arrest and heard him talk, and that his appearance and voice were similar to that man. One of them testified that he was “exactly the same.”

When the defendant stood erect with his coat on and his arms down the bullet hole where the bullet entered the coat

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was four inches lower than the wound where the bullet entered his body. From this it is argued by defendant's counsel that the defendant received the shot causing his wound when his hand and arm were raised above his head drawing his coat up, and that the arms of the assailant in the store were at no time in such a position, and therefore the defendant's wound was not received in the store. Such argument does not demonstrate that the defendant was not the man who was shot in the store by Arling. At most, it is but an inference of fact, which, and the weight of it, were for the jury. That Arling shot one of the assailants in the store is sufficiently shown; indeed, that fact is not seriously controverted. But no one at that moment saw either the assailant or Arling. In what position Arling was when he shot or the assailant when he received the shot is not disclosed. Counsel, in oral argument, told us that that was very clearly shown; but the record does not support the contention. It clearly and without dispute supports the contrary. As already shown, the only living witness to the homicide was Merlin. When the second shot was fired at the deceased, and the assailant directed his attention towards the ice chest, Merlin retreated to the storeroom. Shots were fired after that, but he while in the storeroom could not see either Arling or the assailants, and did not know that Arling had taken the gun from the ice chest or had discharged it until the assailants had fled. Thus counsel base a positive conclusion upon nonexistent premises, at least upon premises wholly conjectural and speculative—the position the assailant or Arling was in at the time the former was shot. The argument that the defendant, if he was one of the assailants, must, when he was shot, have been in the middle of the room with his hands raised above his head, is not the only deducible inference. It is shown that when the assailants entered the store Arling was sweeping near the ice chest, in which lay the deceased's revolver. On the record, when the assailants entered and began shooting the deceased, it can be inferred that Arling rushed to the ice chest for the revolver, and as he reached for it he either was shot, or was shot at, for one bullet mark was found on the inside of the chest where was the revolver.

It can further be inferred that he got the revolver and ran or fell behind the counter where his dead body and gun were found, a short distance from the chest. One bullet hole was clear through his body and straight down through the floor, showing that the assailant, when he fired that shot, leaned or reached over the counter while Arling was down on the floor behind the counter. It also can be inferred that Arling may have shot the assailant as the latter was leaning and reaching over the counter, which position would account for the upraised arm and coat of the defendant and the course the bullet took through his coat and body. That, of course, is but an inference, but it is as probable as the argument of counsel that the defendant, when he was shot, must have had his hands in the air above his head. Then, too, much depends upon the cut and fit of the defendant's coat. Some coats are so cut and fit at the armpit that to raise the arm does not much disturb the body of the coat. Other coats are so cut and fit that to raise the arm draws the body of an unbuttoned coat up very materially, even though the outstretched hand is raised but level with the face. Then the defendant at the time he was shot might have been in a stooping or crouching position with his arm raised, or, seeing the gun in the hands of Arling, might instinctively have thrown his arm and hand up as the shot was fired. Other instances and positions may be conceived to account for the bullet hole in the coat four inches lower than the wound where the bullet entered the defendant's body. But all this is mere matter of inference and argument, and was for the jury.

It further is claimed that no bullet shot from the deceased's gun was found in the store, and that all the bullets which were found were fired from the guns of the assailants, from which, and from the further fact that the bullet which produced the defendant's wound went clear through his body, it is argued that it was not the defendant, but another, who was shot in the store by Arling, and who was not shot through the body, but carried away the bullet lodged somewhere in his body. These also are positive conclusions based on but conjectural or speculative premises, arguing things certain

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from other things uncertain. Such argument is proper enough addressed to a jury; but it has no foundation when addressed to a court to conclusively overcome and repel all other facts and circumstances tending to point to the defendant as the perpetrator of the crime.

Evidence also was given to show that the red bandana handkerchief found in the defendant's room at the time of his arrest was given him by Mrs. Eselius the next morning after the defendant was shot, and that he was not possessed of it on the night of the homicide. Mrs. Eselius testified to that. The credibility and weight of her testimony were for the jury, not for us.

The state produced a witness who shortly after the homicide examined the gun found by the body of Arling, and who testified that, in his opinion, the gun was discharged within an hour prior to the time he examined it. The defendant produced a witness who testified:

"It would be impossible to tell with any degree of accuracy when a cartridge in a revolver was exploded."

It is argued that the defendant's witness showed greater knowledge of, and more familiarity with, the subject. Again, that was mere weight for the jury. We think it of little consequence, for, as already observed, we think there is ample evidence to show that one of the assailants was shot in the store by Arling, and that he shot him with the gun found by Arling's body.

Evidence was also given to show that about four blocks west of the place of the homicide dog tracks stained with blood were found the next morning, which, when followed up, led to a dog with a sore foot; but that was not connected in any manner with the blood found on the sidewalk and in the alley near the place of the homicide, and was wholly different from the spatter of blood found on the sidewalk.

Further evidence was given to show that the deceased prior to his engaging in the grocery business was a member of the police force, and "that all the revolvers on the police department have six chambers; they are loaded with five cartridges,



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and the sixth one is empty, and the hammer rests on the sixth chamber." This and the testimony of the witness that it could not be told when a cartridge was exploded were offered to show that the gun found near Arling was not discharged by him, and hence that neither of the assailants was shot. The probative effect of that was for the jury. It cannot, as matter of law, be said to overcome and to conclusively repel all the other evidence showing that just prior to the homicide all the chambers of the gun were loaded, that immediately thereafter the gun was found on the floor, not with an empty chamber but a chamber containing an exploded cartridge, and other evidence showing that Arling with that gun shot one of the assailants in the store.

Another witness testified that at about eleven thirty o'clock on the night of the homicide he saw two men about eight blocks (more than a mile) west of the place of the homicide, one taller than the other, and as he approached them, a block or more away, he saw the taller fall or lie down on the ground. The witness testified that he walked up to him, and saw him lying on his side moaning and groaning, with his head raised on his elbow. The witness observed him but a moment, and without saying anything to him walked away. The man on the ground arose and followed him for a block, where the witness saw him board a street car. The conductor of the street car testified that a tall man, "acting suspiciously," at that time and at that place boarded the car. The conductor thought he was drunk. He rode with him uptown, and there left the car. Both witnesses testified that that man was not the defendant. This was offered to show that that man was suffering from a gunshot wound, and that he was the man who was short in the store by Arling. The testimony has little relevancy. No one claimed that that man was the defendant; nor was it claimed that the defendant that night was in that neighborhood. The state claimed, and produced evidence to support the claim, that the defendant then was at or near the doctor's office on Fourteenth South receiving attention for a serious gunshot wound. Testimony that on that night after the homicide one answering the description of one of the assailants in the store was found at Eighth West street suffering

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from a gunshot wound would have had probative effect; but the defendant did not prove that the man seen at Eighth West street was suffering from a gunshot wound, or any wound. That a man, after the homicide, was seen a mile or more from the place of the homicide, moaning and groaning on the ground and appearing to be drunk, and, acting strangely, boarded a street car, proves little, if anything. Sufferers may moan and groan from gunshot wounds. But all who moan and groan are not shot.

But the claim of insufficiency of the evidence is chiefly based on the fact that none of the witnesses who saw the assailant at or about the store on the night of the homicide testified positively that the defendant was one of them; and for that reason it is argued that the case is no stronger than the case of *State v. Hill*, 44 Utah, 79, 138 Pac. 1149, where the evidence was held insufficient to connect the accused with the commission of that offense. We think the cases on the facts dissimilar. The testimony of Merlin that one of the perpetrators of the crime was about the same size as that of the defendant, had about the same shaped head, and wore about the same clothes as were shown the defendant wore that night is alone not sufficient. But there is the testimony of the witnesses who saw the taller of the two assailants, in size answering the description of the defendant, run out of the store, heard his voice, and that the voice, size, and appearance of that man were similar to those of the defendant. Though it be conceded that that also was insufficient, still there is the further testimony of the witness who but a few minutes prior to the homicide, close to one of the assailants, in a bright light nearly as light as day, looked him directly in the face. Her attention was particularly attracted to him because of the incident crowding her off the sidewalk. That man and the defendant, as testified to by her, were similar in size and features, had the same slim face, sharp nose, and large nostrils, and the same "defection" or scar on the side of the face and neck. True, that witness would not testify positively that the defendant was that man; but the facts testified to by her as to the description of that man pointed most strikingly to the defendant, and may be entitled to as much or more weight than had the witness, without

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such description, but testified that, in her opinion or judgment, the defendant was that man. In addition to all this was the fresh bullet wound on the defendant. That wound, unexplained, or unsatisfactorily explained by him, was, in connection with other evidence that one of the perpetrators of the crime answering the defendant's description was shot in the store, a relevant mark of identification, especially in light of the defendant's effort to have the fact of his wound concealed, and in view of his statement that he threw his gun away, of his request that the lights of the automobile be turned down, and of no apparent good reason for his giving two sharp penetrating whistles before he entered the Eselius house with Dr. Bird. Gunshot wounds such as had the defendant are unusual and extraordinary. Under all the circumstances the defendant's wound, unexplained, was quite as much a distinguishing mark as though one of the assailants in the assault had one of his ears chopped off. The only explanation the defendant gave of his wound was that he received it at some undisclosed place in a quarrel with some undescribed man over some undescribed woman, in which he "was to blame as much as the other fellow." With other evidence in the case, that unexplained or unsatisfactorily explained wound might, to the triers of facts, point with as much certainty to the defendant as one of the perpetrators of the offense as though that night at eleven-thirty or twelve o'clock some stolen and identified article from the store had been found in his unexplained or unsatisfactorily explained possession. One suffering from such a wound as did the defendant—a wound of such serious and oft-fatal consequences—ordinarily does not walk around the country seeking surgical aid until, from loss of blood, he is about to collapse. Generally such aid is promptly summoned and brought to such a sufferer. The defendant himself, in the cross-examination of one of the state's witnesses, an officer, brought out the fact that the officer after the defendant's arrest stated to him that, if the defendant would tell him the place where and the circumstances under which he received his wound, so that the officer could investigate the facts in such respect, and if true that the defendant received his wound in a quarrel over a woman, he

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would be given his liberty. The defendant declined to give the officer any information, or to make any statement whatever respecting such matter, except that he threw his gun away as Dr. Bird was taking him from Dr. McHugh's office to the Eseliuses. The defendant, of course, was not required to make any statement to the officer. His refusal to make any or to answer any question cannot, though the fact was brought out by the defendant, be considered as an admission of guilt. He had a right to remain silent. Nor can his neglect or refusal to be a witness in any manner prejudice him or be used against him. The state, as in all other criminal cases, was required to prove the defendant's guilt beyond a reasonable doubt. But the defendant, without some proof tending to rebut them, may not avoid the natural and reasonable inferences deducible from proven facts by merely declining to take the stand or remaining silent. If in case of larceny the theft and the unexplained or unsatisfactorily explained recent possession of the stolen property on the accused are shown, he may not avoid the natural inference deducible from such facts that he is the thief by remaining silent or staying off the stand, and offering no proof to rebut such inference. Here the commission of the offense is proved beyond all doubt. That is conceded. Other facts also are shown from which natural and reasonable inferences arise that the defendant was one of, and the active, perpetrator of the offense. The probative effect of them and the natural and reasonable inferences deducible from them cannot be avoided by the defendant remaining silent or refusing to take the stand and offering no proof to rebut them. While the proven facts and inferences against him are neither strengthened nor weakened by his mere silence or failure to take the stand, yet when he, with peculiar knowledge of facts remains silent, or has evidence in his power by which he may repel or rebut such proven facts and inferences, and chooses not to avail himself of it, he must suffer the consequences of whatever the facts and inferences adduced against him tend fairly and reasonably to prove.

We think the evidence sufficient to justify a finding that the defendant was one of the perpetrators of the crime. To hold otherwise is to hold that the accused must be identified or con-

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nected with the commission of the offense by direct testimony of eyewitnesses who unerringly are able to testify positively and unequivocally that he was the perpetrator. There are many instances where the proof of identity rested wholly on circumstantial evidence, as was the case in *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633; *State v. Sirmay*, 40 Utah, 525, 122 Pac. 748; *State v. Inlow*, 44 Utah, 485, 141 Pac. 530. Here there is testimony of eyewitnesses and circumstances pointing to the identity of the defendant. Against that evidence to hold that there is no evidence to connect him with the commission of the offense is to ignore the record. To do what counsel, both by brief and in oral argument, in effect have asked us to do, place ourselves in the jury box, weigh the evidence, determine the credibility of witnesses, consider their opportunity and means of observation, and the reliability and worthiness of their testimony, is to ignore the law and to usurp a function not possessed by us. And yet the import of their argument, especially the oral argument, is on mere weight and worthiness of testimony, arguments such as the witnesses had not positively identified the defendant and had not sufficient means or opportunity of observing and giving a reliable description of the assailants; that of discrepancies as to the description of the hat and clothes worn by one of them; that the defendant was not shot in the store, because the bullet hole in his coat was four inches lower than the wound on his body, and because no bullet shot from the gun near the outstretched hand of Arling's body was found; that because of the custom of police officers to carry guns with the hammer resting on an empty chamber, and because of the testimony of the defendant's witness that it could not with accuracy be told when an empty cartridge was exploded, the gun found near Arling's body was not discharged by him; that the blood found on the sidewalk and in the alley was from a dog; that the man found moaning and groaning at Eighth West street was the man shot by Arling; that the handkerchief found in defendant's room was given him the day after he was shot; and that no motive was shown for the defendant to mask himself and with gun in hand to enter the store and shoot to death his victim, with whom it was not shown he had any acquaintance. All

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this, it is contended, when properly considered and weighed, so clearly repelled whatever testimony there may be to point to the defendant's guilt as to leave no evidence to connect him with the commission of the offense. It is apparent all this was for the jury.

With this conclusion it is unnecessary to inquire into the question of motive. From the proven facts of the homicide it is clear the assailants entered the store to commit murder or robbery. It is immaterial which view is taken of that. *State v. Thorne*, 39 Utah, 208, 117 Pac. 58. Since the evidence is sufficient to show that the defendant was one of the perpetrators who, with his face masked and gun in hand, entered the store and deliberately shot his victim to death, it is immaterial to inquire whether the motive was assassination or robbery. Nothing but a wicked motive emanating from a depraved and malignant heart is attributable to the commission of such a crime as is here indisputably shown.

The defendant was represented by two counsel of his own selection and hire. When the state was about half through with its side of the case, and at the conclusion of the direct examination of a chemist by whom it was shown 7 that the blood found on the sidewalk was of mammalian origin, and upon the witness being tendered for cross-examination, the defendant, without any warning to his counsel, and to their complete surprise, arose and addressed the court:

"May I say a few words?

"The Court: You have a right to be heard in your own behalf.

"The Defendant: I have three prosecuting attorneys here, and I intend to get rid of two of them."

Addressing his counsel, he said to them:

"You sit over there, you are fired, too, see. And there is something I don't understand—

"The Court (interrupting): You need not carry out in detail any difference you may have with counsel if any.

"Defendant: I wish to announce I have discharged my counsel, my two lawyers.

"His Counsel: If you have discharged us, that is all there is to it.

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"The Defendant: If the court will permit, I will act as my own attorney after this, and cross-examine all the witnesses, and I think I will make a good job of it. As far as the district attorney is concerned, I think we will get along fine; he comes right out in the middle of the road. I know where he is at. These fellows here (his counsel), I think I can get along very nicely without them; they are dismissed. Can I act as my own attorney in this case, and cross-examine all the witnesses, and will I have the right to withdraw any witness who has been on the stand here? Bring buckets of blood for all I care, I intend to prove a whole lot of things here; I will prove these records here of the preliminary hearing are the rankest kind of fake. That is what I will prove. And I will prove a whole lot of other things. I will prove that I was not at that store—"

The district attorney interrupted, and suggested that the defendant at the proper time would have an opportunity to make a full statement. Further colloquy followed, when the district attorney, addressing the defendant, stated:

"I will pause a moment and give you an opportunity to cross-examine" the witness.

Counsel for defendant stated that before they retired they desired to say that they had no difference whatever with the defendant, and that his action was entirely unexpected. The court stated:

"I think until further order counsel who have been representing the defendant may proceed. If the court is satisfied that the defendant really knows his own mind, of course, he has a right to discharge his counsel if he prefers to do that"—and requested counsel to proceed with the cross-examination.

"The Defendant: Haven't I a right to discharge my own counsel?

"The Court: The court will make due inquiry into that, Mr. Hillstrom; and if the court is convinced that you really mean what you say, the court will accord you that right."

The defendant replied:

"I mean what I say."

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"The Court: At present counsel may proceed; the defendant may also cross-examine this witness if he desires.

"The Defendant: Without my permission?"

The court thereupon directed the defendant to be seated, and said to him:

"The court will give you an opportunity if you want to cross-examine this witness after counsel who have been representing you have concluded."

Defendant stated the witness was a scientific man and needed no cross-examination, and that "he wouldn't tell anything but the truth." When one of the defendant's counsel began the cross-examination, the defendant, addressing counsel, stated:

"I told you to get out of that door.

"His Counsel: I am acting under the court's instruction; I think you are a little beside yourself at present.

"The Defendant: I am the defendant in this case; I have got something to say.

"His Counsel: I will talk with you later."

Thereupon one of his counsel cross-examined the witness, and then the witness was cross-examined by the defendant himself. At the conclusion of that examination the court again requested counsel to remain—"for the present at least, and to use your best efforts for the protection of the defendant's interest. You at least will have the status of *amici curiae*, and that the defendant also will have the right to cross-examine or examine witnesses, and to take any part in the trial that a defendant may under the Constitution.

"Counsel for Defendant: From the defendant's statement he apparently was under the impression that we were representing the state as well as the district attorney. We trust the court has not observed any such indication."

The court and district attorney both replied that they had not.

When another witness was called, Mrs. Seeley, and on being examined by the state, and defendant's counsel indicating some hesitation in making an objection to a question propounded by the district attorney, the court remarked that he wished counsel to make any objection they thought proper, and



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to safeguard the interests of the defendant, and then observed:

"I think the status better be made definite if counsel do not understand it.

"The Defendant: Am I recognized as my own attorney here?"

"The Court: I will hear from you.

"The Defendant: My counsel seem to be very insistent upon holding their job.

"The Court: The court is going to look into that matter in a moment.

"The Defendant: I wish you would."

Thereupon the jury was directed to retire. After it retired the defendant said:

"There are some packages here; I would like to take charge of them; they belong to the defense and are paid for. \* \* \* My counsel is discharged. I think I have the right to take these. \* \* \* I have friends right here to take charge of them now."

The court told him that he had the right to take charge of them, and that he had the right to discharge his counsel. Upon inquiry from the court as to the defendant's mental condition, counsel for the defendant stated that they had not observed any evidences of insanity, except his recent conduct in court, and at no time thought that he was insane; that he for some reason unknown to them grew suspicious of, and lost confidence in them, and thought they were in collusion with the state. The district attorney intimated that the defendant's conduct looked like "a frame-up" to raise an issue of insanity. Defendant's counsel assured him that the defendant's conduct was as unexpected to them as to him, and that no defense of insanity was at any time discussed or thought of; that they had not intended, and did not intend, to present any such issue, and had not heard or observed anything to indicate that the defendant was insane.

"The Defendant: There won't be no insanity pleas; I assure you of that; no brainstorm either.

"The Court (addressing the defendant): The court wishes to ask you, in view of the statement you have just made, you

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realize it is a remarkable proceeding, at least to get up in the midst of a trial and discharge your counsel?

“The Defendant: Yes, sir.

“The Court: You realize that if there is not sufficient reason for discharging them, that it would be quite difficult to get other counsel to go on with the case at this time; you know that, do you not?

“The Defendant: I will act as my own counsel, and I am going to win this case without counsel.”

Upon request of defendant's counsel, the court granted an intermission to enable them to confer with the defendant and his friends. After such conference the defendant and his counsel returned in court. The latter, addressing the court:

“Under the situation, we will proceed to act in behalf of the defendant on the court's appointment, unless the court chooses to appoint some one else in our place. If the defendant wishes some other attorney appointed, we will cheerfully withdraw.

“The Court (addressing the defendant): According to the best information the court has, and after affording you an opportunity to consult so as to protect your rights, I see no reason, at present, at least, why the proceedings should not continue.

“The District Attorney: If I understand, the defendant now consents that counsel continue to represent him.

“Defendant: I want the court to understand that my position is final. I do not object to counsel remaining in the court room; it is none of my business; anybody can remain.

“The Court: I understand you do not object to their asking questions, under the direction of the court, providing you have an opportunity to examine witnesses yourself; is that your attitude?

“The Defendant: Yes; I will examine the witnesses; if they want to also they can go ahead.”

Thereupon the jury were recalled and the trial resumed but a short time when the regular adjournment was taken for the noon hour, and before the examination of the witness Seeley was concluded. When the court convened in the afternoon, additional counsel appeared and asked that his name, at the

request of the defendant and of his friends, and at the special request by wire of an attorney at Denver, be entered as counsel for the defendant. His name was entered, and from thence on all three counsel, with the defendant's consent, represented him, and took part in all of the proceedings to the end of the trial. Such additional counsel and the attorney from Denver have prosecuted the appeal for the defendant.

From all this it is claimed that the court erred in appointing defendant's counsel as *amici curiae* after the defendant had discharged them; in refusing the defendant permission to conduct his case in person and alone without counsel; in not taking an adjournment at once after the defendant had discharged his counsel, to enable him to procure other counsel; and in proceeding against the defendant without counsel. Let it be conceded that the defendant with or without cause had the right to discharge counsel of his own selection and hire, and to defend in person. That was all he asked; that the court granted. He did not ask for other counsel, nor time to procure other counsel; but in a most unseemly manner, wholly without cause, abruptly demanded that his counsel be summarily discharged, and that he be permitted to conduct his case in person. The court granted everything the defendant asked, except the court requested his counsel, as friends of the court, to remain, and in every way protect and safeguard the rights of the defendant. That was for his benefit. It is not claimed that his counsel had been disloyal or unfaithful to him, nor is it made to appear that they had not done all that was proper and competent to be done in defending him. He summarily discharged them just before and in the midst of the examination of one of the most important witnesses for the state—the examination of Mrs. Seeley. With such damaging testimony being elicited against him, to have permitted the defendant to stumble along without assistance of counsel, though that was what he demanded, would have been almost cruel. The cross-examination which counsel conducted for him induced the witness to say that, notwithstanding the marked similarity between the defendant and the man she saw at the store just a few moments before the homicide, she nevertheless had an honest doubt as to whether the defendant was

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that man, and not to testify positively that the man she saw was the defendant. Counsel, in the cross-examination of the state's witnesses, in nearly every instance elicited something of more or less benefit to the defendant, and were alert with objections to all doubtful testimony and questions proffered and propounded by the district attorney. They were familiar with the case, and, as they informed the court when the defendant asked for their discharge, believed in his innocence. That they were loyal to the defendant is not here disputed. Still the defendant had a right to discharge them. After their discharge they no longer could bind him with anything they did or said until after the noon hour, when they, in effect, were re-employed, or re-engaged. When the defendant, in the forenoon, discharged his counsel and demanded that he be permitted to conduct his case in person, the court was required to let him do that alone as he demanded, in which instance, in a case where the defendant's life was at stake, the court would have felt itself obligated to interpose on its own motion all proper objections for him, and to protect him against all improper and irrelevant proceedings, or to appoint counsel as friends of the court to safeguard and protect the defendant's interests. The court, in its discretion, did the latter. True, it appointed the very counsel the defendant had discharged. But the court appointed those whom it believed, because of their familiarity with the case, their loyalty to the defendant, their belief in his innocence, their proper conduct of his defense, could best serve the defendant, and best protect and safeguard his interests. The court may have thought they were in better position to do that than new counsel to be called in. We think the court took the proper and most commendable course. The defendant's conduct in the presence of the court and the jury so abruptly discharging his counsel was so strange and uncalled for, so groundless and senseless, as to cause the court to make inquiry as to his mental condition. Finding nothing to justify a judicial inquiry as to the defendant's insanity or the conclusion that he was irrational, every one disclaiming that, the court, for the benefit of the defendant, appointed his discharged counsel as friends of the court to safeguard his inter-

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ests. Though it should be thought it was not proper for the court to permit counsel after their discharge and until re-engaged by the defendant to participate in the proceedings in the manner and for the purpose indicated, still, on the record, it is manifest that the defendant, with the assistance of such counsel, was benefited and not harmed. Under all the circumstances, the argument in one breath that the defendant was denied his constitutional right to appear and defend in person, and in the next was proceeded against without counsel, is as groundless as was senseless the defendant's action discharging his counsel in the forenoon and re-employing, or re-engaging, them in the afternoon.

A witness, a physician at Salt Lake City, produced by the state at the preliminary examination, there testified concerning the gunshot wounds found on the deceased, the course of the bullets, and the cause of death, and expressed an opinion that the wounds were produced by bullets shot from a thirty-eight caliber gun. The statute (Comp. Laws 1907, section 4670) provides that in case of homicide 8, 9, 10 the testimony at the preliminary examination of each witness must be reduced to writing, as a deposition by the magistrate, or under his direction, and that the magistrate, with the consent of the county attorney, may order the testimony and proceedings to be taken in shorthand, and for that purpose permits the magistrate to appoint a stenographer who, if the defendant be held to answer, is required, within ten days thereafter, to transcribe his notes in longhand, and to certify and file the transcript with the county clerk. The statute further provides that the transcript so certified to and filed "shall be *prima facie* a correct statement of such testimony and proceedings," and (section 4685x1) may be "used \* \* \* at the trial \* \* \* with the same force and effect" as though the witness were present in court and testifying, provided that it be satisfactorily shown to the court that the witness is dead or insane, "or cannot with due diligence be found within the state." The trial began on the 10th of June, 1914. About the 1st of June subpoenas were issued by the state, among them a subpoena for the physician. The officer in whose hands the subpoenas

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were placed for service testified that he, on the 1st or 3d of June, called at the doctor's house to serve him, but found him out making a call, and that "the next time I went, they told me that he was going to go on a trip, and before I could get him the next time he had gone, left the state before I had subpoenaed him." On the 14th of June, and at the trial, the transcript of the physician's testimony was offered in evidence by the state. It was made to appear that the witness then was out of the state and in California, and had been in California since about the 3d or 4th of June. It was not made to appear when he would return, or when he was expected to return. The transcript of the testimony was received over the defendant's objections that due diligence had not been used to subpoena the witness before he departed; that to admit the transcript was to deny the defendant "an opportunity to cross-examine the witness in the presence of this jury"; and that the certificate of the stenographer "did not agree with the testimony given, the certificate being that it was transcribed in longhand, and the evidence being to the contrary effect." Just what is meant by this is not clear, unless that the notes were transcribed in typewriting, and not in "longhand." In addition to these objections, it also here is urged that it was not shown that the testimony at the preliminary examination was taken in the presence of the defendant; that he in person, or by counsel, cross-examined the witness, or had an opportunity to do so; and that the testimony was not taken by an "official court stenographer." We do not see anything to any of these objections. The stenographer was called, and testified that he stenographically reported all the testimony given and proceedings had at the preliminary examination, transcribed his notes in typewriting, certified to the transcript, and filed it with the clerk of the court as by the statute provided, and that his transcript was correct. The transcript shows that the stenographer was appointed and sworn by the magistrate to stenographically report all the testimony and proceedings, and that the testimony of the physician, as well as all other testimony, was given, and that all proceedings were had in the presence of the defendant, and that he was given full opportunity to cross-examine that wit-

ness, as well as all other witnesses. That the witness before the trial began and at the time the transcript of his testimony was offered was not within the state, and was in California, is not controverted. The only claim made in such respect is that proper diligence was not used to subpoena the witness before he left the state. The court found due diligence was used. We see nothing to justify a different finding, and think the objections were properly overruled. Further, the things shown by the transcript of the testimony of that witness were all shown by other witnesses present and testifying, and were things not disputed nor controverted by any evidence.

The physician, after he had described the wounds found on the deceased's body, was asked:

"Are you able to state with what kind of a bullet that wound was made, judging from the appearance of the wound?"

He answered:

"I passed on it at the time; it was a thirty-eight; that was my opinion."

When the transcript of his testimony was read, an objection was made to the question and answer on the ground that it was not shown that the witness possessed sufficient knowledge to express an opinion on such a subject. 11 Here the further ground is urged "that expert testimony must not be offered on matters of fact of common knowledge." This is of but little moment, for the empty shells and bullets found in the store with which the deceased and his son were shot and killed confessedly, and without any controversy whatever, were shells and bullets of thirty-eight caliber, and were shot from a thirty-eight caliber automatic gun.

Complaint is made of the court's refusal to permit answers to certain questions propounded by defendant's counsel to a venireman on *voir dire*. Great latitude was given counsel in the examination of the venireman. After he had repeatedly answered, in response to questions put to him in different forms, that he presumed the defendant innocent, that the state was required to prove his guilt beyond a reasonable doubt, that the jury was the sole judge of the guilt or

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innocence of the defendant, and that, if he was accepted as a juror, he would acquit him, if there was any uncertainty or doubt as to the defendant's guilt, and that he would not convict him if the state had not proved him guilty beyond a reasonable doubt and the fact that the defendant remained silent and refused to testify would not make any difference, he was asked, "Do you understand you are particularly interested in the defendant's side of this case on account of the lawful presumption of the defendant's innocence?" and "You understand, do you not, that a juror is under no obligation to take the opinion of any witness?" Objections were sustained to these questions. Complaint is made of the rulings. We see no error in this. The defendant was permitted to fully examine the venireman as to all these matters; and, further, the venireman was not accepted as a juror, but was peremptorily challenged by the defendant, who then had ten peremptory challenges left. 12

The court charged the jury:

"If you believe any witness has willfully testified falsely as to any material facts in this case, you are at liberty to disregard the whole or any part of the testimony of such witness, except as he may have been corroborated by credible witnesses or credible evidence in the case." 13

Complaint is made of this. It is urged that, "standing alone, it is not the proper instruction," because the jury were not correctly guided as to "rules of law in determining the credibility to be given to the testimony of the witnesses." A similar charge was before us in the case of *State v. Morris*, 40 Utah 431, 122 Pac. 380. What we there said answers, as we think, all the objections here made.

The defendant requested six instructions on circumstantial evidence. Complaint is made because they were not given as requested. A comparison of the charge and the requests shows that the substance of them was given. 14, 15, 16 The court gave two paragraphs on the subject, and therein stated all that was necessary to be said. In one of them the court used this language:

"You are instructed that circumstances of suspicion, if



they amount to no more than suspicion, are not sufficient proof of guilt. In order to convict the defendant upon circumstantial evidence, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other reasonable conclusions. It is not sufficient that the circumstances proven coincide with, account for or render probable merely that he is guilty, but they must exclude beyond a reasonable doubt every other conclusion but that of the guilt of the defendant."

Complaint is made of the first sentence. The criticism made of it is that the court by that language told the jury that "circumstances of suspicion" was evidence. We do not think the charge open to that. Besides, the claimed objectionable language was language taken from one of the defendant's requests, and hence, if erroneous, was error of the defendant's own creation.

Thus on a review of the record we are satisfied that there is sufficient evidence to support the verdict; that the record is free from error; and that the defendant had a fair and impartial trial, in which he was granted every right and privilege vouchsafed by the law.

Hence does it follow that the judgment of the court below must be affirmed. Such is the order.

FRICK, J. I concur. It may, however, not be improper for me to add a few words regarding appellant's contention that this case should be controlled by the decision in *State v. Hill*, 44 Utah 79, 138 Pac. 1149, where we held that the evidence, as a matter of law, was insufficient to sustain the verdict of the jury. The inferences that the jury were authorized to deduce from the uncontroverted facts in this case clearly distinguish it from the Hill case. Had there been conclusive evidence in the Hill case that Hill was shot through the body with a revolver, and it was further shown that the revolver in question had been in the hands of the deceased in that case, and no explanation had been made regarding the wound in Hill's body other than that vouchsafed in this case, there would be at least some similarity between the cases. In such

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event, however, the decision in the Hill case would have been different. Moreover, the evidence of identification in the Hill case was wholly different in its legal effect from that in this case. While it is true that the witnesses in the Hill case stated that the person they saw before and about the time of the homicide resembled Hill in size and build, yet in every instance when these witnesses undertook to describe the person they claimed they saw, they described a person other than Hill. The latter statements thus clearly neutralized the prior identifying statements of the witnesses, and thus left Hill wholly unidentified as the person who was supposed to be implicated in the homicide with the slayer who was killed in the saloon, and who it was shown killed the officer. In view of the uncontroverted facts in this case, the jury were justified in entirely ignoring the claim made to the doctor by the appellant that he was shot elsewhere than in the store where the homicide occurred. The all-important facts that appellant was shot through the body by some one, that he was shot about the time and, as all the circumstances show, at the place where the homicide occurred, and that no one discovered or heard of any other shooting occurring on the night of the homicide except at the Morrison store are all unquestioned.

From the foregoing facts, when considered in connection with the other identifying evidence and circumstances, the jury were authorized to conclude—indeed, it is not easy to perceive how rational men could have arrived at any other conclusion—that the appellant was, in fact, shot in Morrison's store at the time of the homicide. The fact that appellant was not required to take the stand and testify in his own behalf, as pointed out by Mr. Chief Justice STRAUP, cannot affect the inferences that naturally spring from the uncontroverted facts and circumstances. The jury had a right to assume that, even though the appellant wanted to shield some one from disgrace, if nothing more, and was unwilling to disclose who shot him, yet the public generally had no such interest to shield any one, and for that reason, if the shooting mentioned by the appellant had, in fact, occurred, some one would have discovered the fact, if not the cause, and would have made it known before the trial. The shooting of a hu-

man being, whatever the cause, in a populous city like Salt Lake, is not such a common and ordinary occurrence that the fact that it occurred can long be kept secret; and yet, if appellant's claim is true, the shooting in his case has entirely escaped discovery by any one. The jury were not bound to believe what to all others must appear to be unreasonable and wholly improbable. Again, the jury had the further right to believe that any reasonable human being would be willing to suffer most any humiliation rather than to shield a murderer who could commit a murder as foul as was the murder of the Morrisons. In order, therefore, to advise the officers, as well as the public, that some one else committed the dastardly crime, and to give the officers an opportunity to discover and apprehend the real assassin or assassins, any reasonable person situated as was appellant would at least disclose where and for what reason he was shot, even if he did not pursue the person who shot him, and in that way place the responsibility of the Morrison homicide where it belonged. His refusal to do that by refusing to disclose where and by whom his wound was inflicted, left the jury no choice save to accept the natural and probable inferences to be deduced from all the uncontroverted facts and circumstances, and no doubt, in their judgment, those inferences, without a single exception, pointed to the fact that the appellant was shot in Morrison's store at the time of the homicide, and hence is guilty of the charge preferred against him.

In view, as pointed out by Mr. Chief Justice STRAUP, that no errors of law occurred at the trial, we have no alternative save to permit the verdict of the jury to stand.

McCARTY, J. (concurring). I have with much care examined the record in this case, and am convinced that the evidence is not only consistent with theory that defendant participated in the commission of the crime for which he stands convicted, but that it is inconsistent with any other theory. In my brief discussion of what I regard to be the salient points raised and presented by the defendant, I shall not attempt to set forth or to review the evidence in detail. The statement made by the Chief Justice of the facts and cir-

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cumstances in evidence is so full fair and comprehensive, and so clearly reflects the record, that nothing more by way of marshaling the facts need be said.

Counsel for defendant in support of their contention that the evidence is insufficient to justify the verdict claim, among other things, that the defendant was not identified as one of the men who entered the Morrison store on the night in question (January 10, 1914) and committed the crime charged in the information. As I read and consider the evidence tending to identify the defendant as one of the perpetrators of the crime, it is about as conclusive on that point as though the witnesses had positively identified the defendant as the taller of the two men who were at and in the immediate vicinity of the crime just before and immediately after it was committed. The description that Mrs. Seeley gave of the taller of the two men whom she and her husband met at the intersection of Eight South street and Jefferson avenue tallies with the description of the defendant in practically every particular. She testified that the man she met "was a sharp-faced man with a real sharp nose, and his nostrils were rather large," and that he had a "defection" or scar on the side of his face or neck. The defendant was described as having a similar scar on the side of the face or neck, "a real sharp nose," and large nostrils. The witness further testified:

"Q. How does the height of the defendant, Mr. Hillstrom, compare with the height of the man that turned and looked at you there at that time? A. Very much the same. \* \* \*

Q. As to build? A. Yes; they were slender built, both of them. \* \* \*

Q. How does Mr. Hillstrom, as he sits here, compare in regard to thinness with the man that you saw that day? A. His thinness is just about the same, \* \* \*

but his hair is entirely different. Q. In what respect is his hair different? A. His hair has been cut. \* \* \*

Q. Did you state whether or not the appearance of the defendant's hair is anything like the hair you saw on this man that night? A. He had light hair; yes; the one I saw. Q. Light hair? A. Yes; medium complexioned, like this man."

Another witness, Mrs. Vera Hansen, testified:

That she lived on West Temple street directly opposite Mor-

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risson's store; that she was at home on the evening of January 10, 1914, between nine and ten o'clock, and "was sitting in the front room, the nearest the street"; that she "heard a loud noise that sounded like pistol shots"; that she immediately "opened the front door and looked out to see what it was"; that she saw a man "just coming out, just stepping out, of the door" of the store, and saw "little Merlin" Morrison "back in the store"; that she then ran out on the sidewalk; that the man she saw came out with his hands "to his chest and in a stooping position," and that she heard him say, "Oh, Bob!" that it sounded like a "voice full of pain; that it was unusually clear for a man's voice, \* \* \* not hoarse at all"; that in less than a week thereafter she visited the county jail and heard the defendant talk, and that his voice "sounded exactly \* \* \* like the voice of the man that came from the store that night calling, 'Oh, Bob!'" that she saw the defendant standing erect in the county jail after he was arrested. "Q. How did his height and how does his height now, Mrs. Hansen, compare with the man that you saw come out of Morrison's store? A. Compares exactly."

Another witness, Nellie Mahan, testified that between nine-thirty and ten o'clock p. m. on the night in question she was at her home across the street south from the Morrison store; that she heard shots, and immediately thereafter looked out of the window and saw a man stooping with his hands on his chest and running from the store diagonally across the street in a southwesterly direction towards the alley mentioned by the Chief Justice in his statement of the facts; that she heard the man say two or three words that she did not understand as he was crossing the street, and then heard him say, "I am shot"; that she saw the defendant at the county jail stand erect, and "all I can say is, that man was very tall and very thin, and so is Mr. Hillstrom."

Counsel for defendant, in their printed brief, refer to and characterize the evidence of Mrs. Seeley as "very shadowy pretense of testimony, \* \* \* thoughtless, loose, flippant talk," and urge that it should have been "stricken from the record." Commenting on Mrs. Hansen's evidence, they say:

"Consider for a moment the utter worthlessness of such

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testimony to prove a fact. \* \* \* The actual experience of mankind confutes this testimony."

The *ipse dixit* of counsel are the only expressions (aside from criticisms, which are without merit, directed to the manner in which the examination of these witnesses was conducted by the district attorney) we have from them respecting this evidence. No claim is made that these witnesses, or any of them, were unfriendly to the defendant, or that they showed any bias or prejudice in the case. In fact, a perusal of this evidence, as contained in the bill of exceptions, I think, will show so far as it is possible for a record to reflect the demeanor and state of mind of witnesses, that they were not biased or prejudiced against the defendant, and that neither of them was "thoughtless," or "flippant" in giving testimony. The weight, however, that should be given the testimony, regardless of whether the witnesses were sedate and serious or thoughtless and flippant while testifying, was for the jury.

Mr. Wharton, in discussing this character of testimony in his work on Criminal Evidence (10th Ed.), at section 803 says:

"We have a right to hold, in fact, that it is an absolute law that each individual should have certain features assigned to him by which he is distinguishable from all others, and that these features, while subject to gradual modification by age, should yet retain their characteristics so as to be distinguishable for months, even under the most artful disguises. The whole figure may be changed by dress; the hair may be cut off or dyed; yet the eyes, *the nose*, the mouth, *the voice*, remain, each of which possesses traits that cannot be defaced by any means short of destruction. \* \* \* But the face is not the only test. *Voices are equally distinguishable*, and their distinguishability has been made the basis of convictions in criminal courts." (*Italics mine.*)

In 3 Wharton & Stille's Med. Jur., section 636, it is said:

"Besides the general appearance, dress, manner and voice of a person, peculiar marks upon the body are very important, perhaps much the most reliable, means of identification. Scars, burns, cicatrices, fractures, etc., upon some portion of the body of the prisoner, distinctly remembered by those who have seen them, will generally be received as evidence of identity. Very often where the scars resemble each other they may have been caused by different agencies. In such cases the evidence of physicians can be brought to

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testify as to the cause of the wound. Still such evidence is not always reliable, for a mark of such a nature may exist from exactly the same cause in two different persons. It goes, however, a great way in establishing an identity, and is generally conclusive, unless rebutted by stronger contradictory evidence."

See, also, 3 Chamberlayne, Mod. Ev., section 1367; *Commonwealth v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861.

The undisputed evidence shows that the scar on the face and neck of the taller of the two men whom Mrs. Seeley and her husband met across the street a short distance west of the Morrison store just before the homicide was committed corresponded in size and appearance with that on defendant's face and neck. In this case there is, in addition to the scar and other natural features, characteristics and marks more or less peculiar to individuals mentioned by Mr. Wharton, the dangerous gunshot wound inflicted on the taller of the two assassins, which the evidence tends to show corresponded with the gunshot wound received by the defendant the same night. Besides, there are other facts and circumstances in evidence of an incriminating character. The statement made voluntarily by the defendant to Dr. McHugh that he was shot in a quarrel over a woman and wanted the matter "kept private," his refusal to inform the officers of the place and the circumstances under which the alleged "quarrel over a woman" took place, notwithstanding the officer assured him that he would be given his liberty if his statement in that regard should be found to be true (the evidence on this point, as stated by the Chief Justice, was brought out by defendant on his cross-examination of the officer), his throwing away his gun as he was being taken by Dr. Bird to the Eselius home, his request that the doctor turn down the lights of the automobile just before they arrived at the Eselius home, his two "shrill and penetrating" whistles when he and the doctor arrived at and just before they entered the Eselius home, were all so unusual and extraordinary and so at variance with the conduct and movements of men who are peaceably inclined and law-abiding that the jury were justified in finding that the explanation the defendant gave of his wound was false, a mere

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subterfuge, and that the Eselius home was at that time a rendezvous for criminals, and recognized as such by the defendant.

There is but little, if any, similarity of facts in this case and in the case of *State v. Hill*, 44 Utah 79, 138 Pac. 1149, cited by defendant in support of his contention that the evidence is, as matter of law, insufficient to justify the verdict. In the Hill case the evidence not only failed to identify the defendant as one of the robbers who committed the crime there charged, but tended to show affirmatively that he was not. Whereas in this case the movements and conduct of the defendant on the night of and soon after the homicide was committed, coupled with the other facts and circumstances in evidence to which I have referred, and which are set forth in detail by the Chief Justice, point with unerring certainty, as I read the record, to the defendant as one of the perpetrators of the crime charged in the information.

I therefore fully concur in the reasoning of and in the conclusions reached by my Associate.

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CONSOLIDATED WAGON & MACHINE CO. v. BARBEN  
et al.

No. 2745. Decided July 3, 1915. (150 Pac. 949.)

1. SALES—ACTIONS—WARRANTIES. A written contract of sale contract of sale contained a warranty, providing that if after a trial of five days the machinery should fail to fulfill the warranty, written notice should be given to the seller and also the agent from whom the machinery was received, and that failure to make such trial or give such notices should be conclusive evidence of due fulfillment of warranty. Notice of breach of warranty was given to the agent, but not given to the seller until nearly a year after the sale. *Held* that as notice was a condition precedent to the reliance on the warranty, action for the price could not be defeated on the ground of breach of warranty, the notice to the agent not being enough.<sup>1</sup> (Page 383.)

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<sup>1</sup>*Orchard Co. v. Canning Co.*, 32 Utah, 233, 89 Pac. 1010, 12 L. R. A. (N. S.) 540.



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2. **SALES—WARRANTIES—ACTION.** Where a contract of sale required machinery found defective to be returned, a failure to return defective machinery precludes reliance on the warranty. (Page 383.)

Appeal from District Court, Fifth District; Hon. *Joshua Greenwood*, Judge.

Action by the Consolidated Wagon & Machine Company, a corporation, against Fred Barben and others, partners.

Judgment for defendants. Plaintiff appeals.

REVERSED and remanded, with directions.

*W. B. Higgins* and *Stewart, Bowman, Morris & Callister* for appellant.

*J. A. Melville* for respondents.

#### APPELLANT'S POINTS.

Where the parties themselves stipulate what the result of a breach of a particular contract shall be, the courts will enforce the stipulation. (*Foxley v. Rich*, 35 Ut. 162, 179; *King v. Towsley*, 64 Iowa 75, 19 N. W. 859.)

In the case at bar the defendants cannot defend on the ground that the machinery did not fulfill the warranty unless they allege and can show compliance with the terms and stipulations thereof. This they have failed to do. (*Murphy v. Russell et al.*, 67 Pac. [Ida.] 421, 423-424.)

Parties may, by the express terms of their contracts of sale, make a failure to give notice of defects to the seller within the stipulated time, conclusive evidence that the warranty is fulfilled to the satisfaction of the purchaser. (*Murphy v. Russell*, 67 Pac. [Ida.] 421, 424; *Furneaux v. Esterly*, 36 Kan. 539, 13 Pac. 824; *Beasley v. Huyett & S. Mfg. Co.*, 92 Ga. 273; *Case Threshing Machine Co. v. Ebbighausen*, 92 N. W. [N. D.] 826; *Russell v. Murdock*, 79 Iowa 101, 44 N. W. 237; *Fahey v. Machine Co.*, 55 N. W. [N. D.] 580; *Machine Co. v. Hartman*, 53 N. W. [Neb.] 566.)

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## RESPONDENTS' POINTS.

A waiver by the party for whose benefit or protection notice should be given is equivalent to notice and dispenses with its necessity. (29 Cyc. 1117; *Smyser v. Fair*, 73 Kan. 773; *Taunton Bk. v. Richardson*, 5 Pick. 436; *People v. Albright*, 23 How. Pr. 306; *Wood v. Stewart*, 7 Vt. 149.) An allegation of actual notice is supported by proof of waiver of notice, since the latter is equivalent to the former. (29 Cyc. 1125.) If there is a mutual departure from the terms of a contract, and afterwards one of the parties concludes thenceforth to stand on the letter of the contract, he must notify the other. (9 Cyc. 617; *Eaves v. Cherokee Iron Co.*, 73 Ga. 459.) A party to a contract may dispense with a condition in his favor, and when this is done, it is the same as though the thing dispensed with had been done. (*Mining Co. v. Mining Co.*, 5 Ut. 624.)

## FRICK, J.

The plaintiff, a Utah corporation, brought this action to recover the sum of \$1,000 upon a contract of sale entered into between it and the defendants. The \$1,000 was originally payable in three installments, as follows: \$334 on December 1, 1912; \$333 on December 1, 1913, and \$333 December 1, 1914. The action was commenced December 1, 1913. It was, however, alleged in the complaint:

"That by the terms of said contract if any payment provided for therein is not made at the time provided for, the whole of said \$1,000 shall then and there become due."

It was further alleged that the defendants had failed to make the payment which fell due on December 1, 1912, or any part thereof. The defendants appeared and defended the action. They alleged in their answer that the \$1,000 sued for constituted the purchase price of a certain threshing machine, horse power and attachments, all of which machinery, they alleged, was warranted by the plaintiff; that said machinery had failed to fulfill the warranty in certain particulars, and hence defendants were not liable upon the contract. The

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contract of purchase was in writing, was dated July 11, 1912, and was signed by both parties thereto. After describing the machinery purchased and the terms and conditions of payment, the contract also contained the following provision:

"The company [plaintiff] makes this sale subject to the warranty written on the reverse side of this contract, and it is expressly agreed and fully understood by all of the parties hereto that no verbal agreement, warranty, guaranty or representation whatever is binding on either or any of the parties hereto or otherwise except as it is written on the back hereof. This written contract contains all the terms of this order, purchase and sale."

The following is the warranty referred to and relied on by the defendants:

"We guarantee farm implements and spring work for one year from date of sale, and automobiles and all farm machinery and agricultural implements for the first season. This warranty is against defective materials and workmanship. Parts claimed to be defective must be presented for inspection at our office at Salt Lake City, Utah, and if pronounced defective by us, duplicate parts only will be furnished free f. o. b. factory. We do not warrant tires, springs or paint, neither will we pay repair bills.

"It is further agreed that a defect, within the meaning of this warranty, and any part of the machine, attachment or article shall not, when such part is capable of being removed and repaired or replaced, operate to condemn said machine, attachment or article.

"It is warranted that the machinery and goods hereby sold are made of good material, and durable with good care to do as good work, under the same conditions, as any made in the United States of equal size and rated capacity. If properly operated by competent persons with sufficient steam, gasoline, horse or other power, as the case may be, and the printed rules and directions of this company and of the manufacturers are intelligently followed. If by so doing, after trial of five days by the second parties, said machinery or other articles shall fail to fulfill the warranty, written notice thereof

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shall at once be given to the company and also to the agent through whom received, stating in what parts and wherein it fails to fulfill the warranty, and a reasonable time shall be given to said company to send a competent person to remedy the difficulty, the second parties rendering necessary and friendly assistance, said company reserving the right to replace any defective part or parts, and if then the machinery cannot be made to fill the warranty, the part that fails is to be returned by the second parties free of charge to the place where received and the company notified thereof, and at the company's option, another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned and the contract rescinded to that extent and no further claim made on the company. Failure so to make such trial or to give such notices in any respect shall be conclusive evidence of due fulfillment of warranty on the part of said company and that the machinery is satisfactory to the second parties and the company shall be released from all liability under the warranty. Any assistance rendered by the company, its agents or servants in operating said machinery or in remedying any actual or alleged defects, either before or after the five days' trial, shall in no case be deemed any waiver of, or excuse for any failure of the second parties to fully perform the conditions of this warranty, when at the request of the second parties a man is sent to operate the above machinery, which is found to have been carelessly or improperly handled, said company putting the same in working order again, the expense incurred by said company shall be paid by said second parties. If any part of the machinery fails from defect of material while this warranty is in force, the company has the option to repair or replace the same on presentation of the defective part or parts, but deficiency or defects in any piece shall not condemn other parts, and the second parties expressly waive all claim for damages on account of the nonfulfillment of said warranty by any of the described machinery. A failure to live up to any of the provisions hereof or to make any payment as heretofore provided in this contract or to comply with any of the conditions of this warranty on the part of the second parties or any abuse, mis-

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use, unnecessary exposures of machinery or waste committed or suffered by the second parties, or carelessness on their part or inefficiency in handling of the said machinery discharges the company from all liability whatever."

The particulars in which the machinery was alleged to have been defective are set forth in the answer as follows:

"Defendants further allege that defective materials and workmanship was used in the construction of the said threshing machine, consisting of a separator, horse power and attachment, referred to in said contract, attached to plaintiff's complaint; that the said machinery was not made of good materials; that the workmanship in the same was poor and inferior, and said machinery would not do as good work under same conditions as any made in the United States of equal size and rated capacity, although it was operated by competent persons with sufficient horse power, that being the power by which it was constructed to have been operated, and although the printed rules and directions of the plaintiff company and manufacturers were intelligently followed.

"Defendants further allege that the fundamental construction and general plan and the operation of the said machinery was fundamentally wrong in this: The gearing of said machinery and tension of the same and the propelling power was too low; that it was impossible by the application of the necessary horse power for its operation to get up a reasonable speed or tension, or to get the machinery under proper motion for threshing grain, and as a result the grain threshed was not properly cleaned, much of it was wasted, and it was unreasonably chopped up, thereby greatly depreciating its market value; that not more than half of the amount of grain could be threshed by said machinery, when operated by competent persons, with a sufficient amount of horse power, in a given period of time, that could be threshed by any like, or similar, machinery made in the United States of equal size and rated capacity."

The pleader then averred the efforts that had been made by the defendants to operate the machinery, and further stated that they had been unable to make the same work satisfactorily. The plaintiff filed a reply in which it admitted the

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warranty relied on by defendants, and in effect denied all other averments contained in the answer. A trial to a jury resulted in a verdict for the defendants. The court entered judgment on the verdict, from which this appeal is prosecuted.

Plaintiff's counsel have assigned numerous errors, the principal one being that the evidence does not support the verdict and judgment. It is strenuously insisted that the uncontradicted evidence shows that the terms of the warranty had not been complied with by the defendants, and <sup>1, 2</sup> hence they could not successfully defend an action for the recovery of the purchase price of the machinery purchased. For example, it is contended that the warranty provided as follows:

That if "after a trial of five days by the second parties said machinery \* \* \* shall fail to fulfill the warranty, written notice thereof shall at once be given to the company and also to the agent from whom received, stating in what parts and wherein it fails to fulfill the warranty. \* \* \* Failure so to make such trial or to give such notices in any respect shall be conclusive evidence of due fulfillment of warranty on the part of said company and that the machinery is satisfactory to the second parties, and the company shall be released from all liability under the warranty."

Appellant's counsel contend that the defendants have failed to comply with the conditions of said warranty in that they have failed to return the machinery and have also failed to give the notices provided for, and hence they may not rescind said contract nor defeat plaintiff's rights to recover the purchase price of said machinery. The uncontradicted evidence shows that the contention just stated is well founded. Although defendants took possession of the machinery in August, 1912, the only notice ever given to the plaintiff is the following:

"Delta, Utah, Nove. 3, 1913.

"To the Con. Wagon & Machine Co.—Dear Sir: I have tried to get my company together, but find out that I cannot get any results. All I can get out of them that are willing to make the first payment if you will take it back as it did not

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give satisfaction. You did not come to aid us until the last of October, 1913, when the work was all done. I wish you could except that offer and come in July, 1914, start that machine up to do the work as it should do and we will be glad to pay it up in full. I wish you would remember that we bought that machine to be in good running order with everything with it that belongs to a machine to go right in the field to work but don't you know when we first got that machine we had to go five miles to get it when we had a depot right at home but I don't care for that, it was short of measuring box, short of chinge for horse power that take two weeks to get it. Then we go out in the field; would not work. We sent for a smaller cogwheel. Was two months before we got that. By that time we lost all that work and when we got the cogwheel it broke the first thing. We sent for another or more and we could not make it work right. We kept writing you and Beckstrand but got no aid as yet and also it made our boys sore that we bought a complete outfit and because it did not all come at once. Charge us up with extras when we paid big price for it."

Although it is stated in the letter that "we kept writing you," the evidence is conclusive that no notice was given the plaintiff except the one here set forth. The machinery, therefore, was in the possession of the defendants much more than a year before they made any attempt to comply with the condition requiring them to notify the plaintiff respecting any alleged defects in the machinery covered by the warranty. It is true that they contend that they notified the local agent, and that he attempted to make the machinery work. It is, however, also true that notice to the local agent alone was not a compliance with the express terms of the warranty, and, standing alone, can afford the defendants no protection. This has so often been decided to be the law by the courts under warranties like the one in question that we can add nothing new to the subject, and hence all that can be required of us is to call attention to a few of the many cases upon the subject. The following cases are decisive of the question under consideration: *King v. Towsley*, 64 Iowa 75, 19 N. W. 859; *Russell & Co. v. Murdock*, 79 Iowa 101, 44 N. W. 237, 18 Am. St.

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Rep. 348; *Murphy v. Russell*, 8 Idaho 133, 67 Pac. 421; *Fur-neaux v. Easterly & Son*, 36 Kan. 539, 13 Pac. 824; *Beasely, Hallett & Co. v. Smith, etc., Co.*, 92 Ga. 273, 18 S. E. 420; *J. I. Case, etc., Co. v. Ebbighausen*, 11 N. D. 466, 92 N. W. 826; *Fahey v. Easterly, etc., Co.*, 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554; *J. I. Case, etc., Co. v. Hall*, 32 Tex. Civ. App. 214, 73 S. W. 835; *Wilson v. Nichols & Shepherd Co.* 139 Ky. 506, 97 S. W. 18; *Nichols & Shepherd v. Rhoadman*, 112 Mo. App. 299, 87 S. W. 62; *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227; *Aultman & Taylor, etc., Co. v. Wier*, 67 Kan. 674, 74 Pac. 227. That such stipulations in warranties like the one in question are conditions precedent, and unless substantially complied with will prevent a successful defense against an action for the purchase price, has, according to the author of 2 Mechem on sales, sections 1383, 1384, 1386, become elementary law. In *Wilson v. Nichols & Shepherd Co., supra*, the Court of Appeals of Kentucky, in passing upon provisions like those in the warranty before us, says:

"Contracts similar to this have been before this court in a number of cases, and it has uniformly been ruled that, when the parties to the contract have agreed upon the warranties and the remedies that accrue upon a breach of them, these remedies constitute the only relief in this particular that the purchaser has, and he must look to his contract and be governed by its stipulations. The contract here affords to the purchaser a remedy, if the warranty is broken, that will at once relieve him from all liability. He can return the machine, and demand his purchase notes, thereby canceling the contract; but if he elects to retain the property in its defective condition he must pay the purchase price"—citing cases.

The same thought is expressed by Mr. Justice Straup in *Orchard Co. v. Canning Co.*, 32 Utah, 233, 89 Pac. 1010, 12 L. R. A. (N. S.) 540, in the following words:

"The rule deduced from the authorities is that where the parties have not stipulated as to the course which shall be taken in case of a failure of the warranty, the vendee has his election either to sue on the warranty, or to rescind the contract by returning the property and bringing an action for the money received by the seller. But it is competent, however, for the parties to provide by contract that a particular course shall be pursued on a failure of the warranty. That is what the parties have done in this case. The return of the



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defective cans to plaintiff's factory was, by the agreement of the parties, made a condition precedent to the right of recovery for a failure of the warranty."

The parties in the case at bar, in specific terms, have provided what course shall be pursued by the defendants in case the machinery shall fail to fulfill the terms of the warranty. One of the things required to be done was the service of written notice both on the local agent and also upon the company within a specified time, in which the particular defects claimed to exist in the machinery shall be stated. Another condition was that if the machinery was defective and plaintiff failed to comply with the terms of the warranty, in order to entitle the defendants to rescind and be relieved from their obligations they must return the machinery if the whole is defective, or the defective parts, to the plaintiff. The defendants wholly failed to comply with the condition of serving notice so far as the company is concerned. They did not even attempt to comply with that provision. This, under the cases before cited, is alone sufficient to prevent them from sustaining a defense to an action for the purchase price of the machinery. They further failed to comply with another condition which was equally important, and which has the same effect regarding their right to defend this action, namely, they utterly failed to return the machinery, or any part thereof, as stipulated in the warranty. Notwithstanding this fact, and that they have retained the possession of the machinery, they nevertheless were wholly absolved from paying any part of the purchase price. They were thus with absolute impunity permitted to violate the terms of the contract, which, so far as disclosed by the evidence, was deliberately entered into in good faith by all the parties. To permit parties to thus violate their obligations must ultimately lead to an entire disregard for law and order. To permit this in the long run will reflect and react most strongly upon the very class which now and then is given supposed relief against the performance of their own obligations by a jury of laymen for no other reason than that, in their judgment, the stipulations of the contract are not such as they can approve. The defendants in this case had a choice of agreeing to the stipulations con-

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Appeal from Fifth District.

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tained in the contract of or refusing to do so. They chose to enter into the stipulations, and they must abide by their choice. They had a clear and adequate remedy if the machinery proved defective in any particular covered by the warranty.

Defendant's counsel, however, claims that there was some evidence to the effect that the plaintiff had waived either some or all of the stipulations contained in the warranty. There is absolutely no competent evidence whatever to sustain such a claim. In all of the cases before cited there was much stronger evidence of a waiver, and yet in all of them it is clearly held that under the terms of such a warranty the evidence of waiver was wholly insufficient as a matter of law. So here. Indeed, in addition to the want of evidence of a waiver, no waiver was pleaded in the answer, although defendants had every opportunity to so plead.

Without pausing to discuss any of the other numerous errors assigned, we, for the reasons stated, are forced to the conclusion that under the undisputed evidence as it now stands there was but one course open to the trial court, and that was to direct the jury to return a verdict for the plaintiff for the full amount sued for, with interest and costs, as stipulated in the contract.

The judgment is reversed, and the cause is remanded to the District Court of Millard County, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed. The appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

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Hunt v. P. J. Moran, 46 Utah 388.

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**HUNT v. P. J. MORAN, Contractor, Inc.**

No. 2739. Decided July 3, 1915. (150 Pac. 953.)

1. **APPEAL AND ERROR—REVIEW—VERDICT.** A verdict on conflicting evidence will not be disturbed on appeal. (Page 391.)
2. **MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE.** In personal injury action by servant, question of the master's negligence *held* for the jury. (Page 392.)
3. **MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.** The question of a servant's contributory negligence *held* for the jury. (Page 392.)
4. **MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.** A minor servant who was in charge of a derrick which was operated by a hand crank and was equipped with an iron dog to hold the load in place after it had been elevated did not as a matter of law, assume the risk of injury from a defective dog which the master had the day before placed on the derrick. (Page 392.)
5. **TRIAL—REVIEW—HARMLESS ERROR.** The complaint of a servant injured when the dog with which a derrick was equipped failed to catch did not aver that the master was negligent in failing to inspect. On cross-examination of the servant much was said about the duty of inspection. The court charged that it was the master's duty to exercise reasonable care to provide safe machinery, and that the servant was not required to make a critical inspection of the appliances, but it was the duty of the master, who was required not only to furnish reasonably safe and suitable tools and machinery, but to exercise a continued supervision over them by careful inspection. *Held*, that the instruction, while without the issues, was not prejudicial; the whole charge showing that the master was not bound to make continuous inspections. (Page 395.)
6. **TRIAL—INSTRUCTIONS—REFUSAL.** The refusal of requests covered by the charges given is not error. (Page 397.)

Appeal from District Court, Third District; Hon. *F. G. Loofbourow*, Judge.

Action by Bennie F. Hunt against P. J. Moran, Contractor, Incorporated, a corporation.

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Appeal from Third District.

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Judgment for plaintiff. Defendant appeals.

**AFFIRMED.**

*King & Nibley and P. T. Farnsworth, Jr., for appellant.*

*Cheney, Jensen & Holman and W. R. Hutchinson, for respondent.*

APPELLANT'S POINTS.

If respondent could not tell what the negligence of appellant was we respectfully contend that the trial court should not have permitted the case to go to the jury. (*Richards v. Steam Laundry*, 32 Utah 423.) In *Fritz v. Electric Light Co.*, 18 Utah 493, the court says: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences not of danger but of negligence, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held to a higher degree of skill than the fair average of his trade or profession, and the standard of due care is the conduct of the average, prudent man." (*Bailey on Master and Servant*, section 259, page 575.) In *Brossman v. Machine Works*, 83 Northeastern 936, the Court says, "No duty exists upon the master to inspect common tools in every day use, the fitness of which the employe may be supposed a competent judge." (*Bailey on Master and Servant*, section 251.) It appears that the respondent was thoroughly acquainted with the risk to which he was subjected, knew and appreciated the danger, and the court should have held as a matter of law that the risk was assumed by him. (*Berlin v. Mershon & Co.*, 132 Mich. 183; *Swenson v. Mfg. Co.*, 98 Northwestern 645; *Cowett v. Wollen Co.*, 97 Maine 543; *Murphy v. Eng. Co.*, 57 Atlantic 444; *Langlois v. Worsted Mills*, 57 Atlantic 910; *Uptegrove v. Coal Co.*, 118 Wis. 673; *Pulos v. Railway Co.*, 37 Utah 238; *Monte v. Paper Mills*, 111 Wis., 1114.) Respondent adopted an unsafe and improper method of doing the work. A person is bound to use his senses and cannot plead ignorance of the ordinary laws of nature, and shut his eyes

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to danger, without taking the consequences. If a servant of his own volition chooses to take an unsafe method of doing his work, he is guilty of contributory negligence which will bar his recovery. (*Cowett v. Woolen Mills*, 97 Maine 543, 26 Cyc. 1249, 26 Cyc. 1257; *Montgomery Coal Co. v. Barringer*, 218 Ill. 332.)

#### RESPONDENT'S POINTS.

The law does not require of a servant, facing an emergency through the master's negligence, that nice precision of judgment in the selection of ways and means to accomplish his task which is ordinarily required where no such emergency exists. Under the circumstances presented in this case, certainly the question of contributory negligence was for the jury. (*La Batt Master and Servant*, Vol. 3, secs. 1235 and 1244; *Smith v. Spokane Falls and N. R. Y. Co.*, 100 Pac. 747; *Colorado Midland R. R. v. Brady*, 101 Pac. 62; *Maryland Steel Co. v. Marney*, 42 L. R. R. 842; *Vota v. Ohio Copper Co.*, 42 Utah 129, 129 Pac. 349; *Newton v. O. S. L. R. R.*, 43 Utah 219, 134 Pac. 567; *Schall v. Cole*, 107 Pa. 1; *Producers' Oil Co. v. Bauer*, 120 S. W. 1023.)

#### FRICK, J.

The plaintiff, a minor, sued the defendant to recover damages for personal injuries which he alleged he sustained while in the employ of the defendant through the latter's negligence. The plaintiff, after alleging that he was employed as a "derrick man" and was engaged in hoisting stones with a derrick on a certain day for a certain building then being constructed by the defendant as contractor, alleged that said defendant "negligently failed to provide safe and suitable appliances for stopping, locking or controlling the said derrick in the operation of which plaintiff was employed, and negligently failed to provide a safe and suitable dog or clutch to lock the machinery of said derrick, and to hold the loads hoisted by the same in position after hoisting, but, instead, provided a certain improperly and defectively shaped clutch or dog which was insecurely fastened on said derrick, and which dog or clutch was insufficient and unsuitable for the

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Appeal from Third District.

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purpose for which it was designed and used." Plaintiff, in substance, further alleged that by reason of the insufficiency of said dog it failed to hold at rest a certain cogwheel called the "fall wheel" on said derrick while said derrick was being used to hoist a certain stone which was then to be laid in the building by the workmen constructing the same, and which stone, by reason of the insufficiency of said dog, began to fall; that in endeavoring to stop said wheel and to prevent said stone from falling and from endangering the lives of the workmen who were working underneath said stone, the plaintiff, in attempting to throw said dog into position to stop said fall wheel, had his hand in some manner forced into the cogs of said wheel, and by reason thereof was severely injured. The defendant denied all acts or omissions of negligence, and pleaded contributory negligence, assumption of risk, and that the injury was caused through the negligence of fellow servants. The defense of fellow servants, it seems, was afterwards eliminated from the case. A trial to a jury resulted in a verdict for the plaintiff. The court entered judgment, and, after being denied a new trial, the defendant appealed.

The principal error assigned is that the court erred in denying appellant's motion for nonsuit, which was based on substantially the following grounds: (1) That plaintiff failed to prove any negligence respecting the matters alleged in his complaint, or any of them; (2) that, if there was 1 any negligence shown, such negligence was not the proximate cause of the injury complained of; (3) that the injury was the result of an assumed risk; and (4) that the respondent was guilty of contributory negligence as a matter of law. Appellant's counsel, in referring to the evidence in their brief, say:

"As to the manner in which the accident occurred, there was a decided conflict in the testimony."

It is now well settled, in this jurisdiction at least, that where the evidence is in conflict, it ordinarily is the exclusive province of the jury to determine whether they will accept plaintiff's or defendant's version of the transaction in question, and in such event, if, after examining the evidence, we

find that there is some substantial evidence in support of every essential element which is necessary to entitle the plaintiff to recover, both our duty and our power end so far as the facts are concerned.

The evidence produced by the plaintiff, briefly stated, is to the effect that at the time of the accident he was twenty years of age; that he had been working for the defendant for about two months, and for approximately three weeks immediately preceding the accident was employed in operating a derrick in connection with a fellow workman; that said derrick was used to hoist the cut stones that were to be laid in the walls by the masons in constructing the building aforesaid; that the derrick consisted of an upright frame, to which was attached what is called a boom which turned on a pivot, and which was used to hoist the stones and to swing them to the place where desired; that on the uprights of the derrick were fastened two drums around which the cables were wound that were used in hoisting the stones; that these drums were revolved, and the cables were wound thereon by means of hand cranks which were attached to the drums by an iron shaft, and the power from the crank shaft was transmitted to the drums by means of two cogwheels, the larger one of which was from fourteen to eighteen inches in diameter, and the smaller one four or five inches; that in order to hold the stone in place after it was hoisted from the ground an iron dog was attached to one of the uprights of the derrick. One end of this dog, when "flipped" over, as the witnesses put it, fell onto or between the cogs on the large wheel to keep the drums from revolving and thus to hold both the cables and stone at rest. On the day preceding the accident the dog that was then in use no longer responded to what was required of it, and the blacksmith employed by the defendant to make repairs made a new dog and attached it to the upright of the derrick in place of the old dog. The dog was attached to the upright by passing a bolt through the eye on the dog, and which bolt was fastened into one of the uprights of the derrick, and on the end of which bolt was a nut to hold the dog in place. The new dog, after it had been attached to the upright, was in use for about

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thirty minutes on the evening preceding the accident, and for about two and one-half hours before the accident on the day it occurred. The plaintiff admits that he saw the blacksmith attach the new dog; that it seemed all right, and that it worked all right so far as he saw or knew; that on the morning of the accident, and before it occurred, he operated the hand crank and had hoisted seven stones, and the dog seemed to work all right; that after hoisting the last stone to the proper height he "flipped" the dog over and engaged the loose end thereof between the cogs in the large wheel, and then, as was usual and customary, removed his hand crank from the drum shaft; that immediately after he had done so the dog disengaged itself from the cogs, and the drum began to turn, and the stone to descend; that in order to prevent injury to the men who were then underneath the stone plaintiff again flipped the dog over in order to insert the end thereof between the cogs, and thus arrest the drum from revolving and the stone from descending, which it was rapidly doing; that the dog for some reason did not arrest the wheel, and the plaintiff again seized the dog with his left hand and attempted to engage it between the cogs, and in doing so his fingers were caught somehow in the cogwheel, and his hand or some of his fingers were severely injured. The whole accident happened very quickly, and the plaintiff at the time was also watching the stone which was descending upon the men beneath it, and for that reason was not able to state just how his hand was caught in the cogwheel. He and other witnesses testified that the new dog was placed rather loosely on the bolt in the upright, that is, that the eye of the dog was given lateral play of about three-fourths of an inch, which was too much, and that the end of the dog which was to fall and engage itself between the cogs was not properly fashioned to accomplish that result. Those defects the plaintiff, however, testified he did not discover or know of until immediately after the accident, when the dog was more particularly examined. It is contended that by reason of the lateral play that was allowed the dog shifted sideways, and thus did not properly or squarely connect with the cogs in the wheel, which were only three-fourths of an inch wide, and for the reason



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that the lower end of the dog was not properly fashioned it did not arrest and hold the cogwheel aforesaid. While, perhaps, the foregoing evidence, in the minds of some men, might be deemed insufficient to establish negligence on the part of the master, upon the other hand, in the minds of others it might be deemed quite sufficient to do so. The facts, in our opinion, are not such that all reasonable minds should arrive at but one conclusion, and the question, therefore of whether appellant was negligent was for the jury. The same is true with regard to the claim of contributory negligence on the part of respondent. Nor do we think that, in view of the facts and circumstances, we should hold that the young man assumed the risk. Can it be reasonably contended that under all the circumstances we ought to say that he assumed all the risks incident to the operation of the machinery of the derrick, including the risk that might arise from an improperly fashioned dog or from an improper or insecure attachment thereof to the derrick frame? We think not. The duty to provide a proper dog and to attach the same properly to the derrick devolved upon the master, and not upon the servant. True, the servant assumed the risk of defects that were open to and appreciated by him, but we cannot say, as a matter of law, that the respondent, under all the circumstances of this case, either did or should have appreciated the risk of being injured. It seems he acted, and was required to act, hastily in order to prevent, as he thought, injury to the men or some of them who worked beneath the descending stone. It was for the jury to say, therefore, whether under all the circumstances, he fully sensed and appreciated the risk or danger he was exposing himself to in doing what he did. The same may be said regarding the alleged contributory negligence on his part in so far as the circumstances just detailed apply to that defense. While it is true that all those questions, namely, appellant's negligence, respondent's contributory negligence, and his assumption of the risk, which latter, under the circumstances, is, perhaps, the most important one here, are all close and in the minds of some may be doubtful, yet, for that reason, if for no other, they were for the jury. We, in common with other courts, have often held

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that, where these questions are shrouded in doubt, they are always for the jury. It is only in cases where it is clear that there is no negligence upon the part of the master, or that there is contributory negligence on the part of the servant, or that he under all the circumstances assumed the risk in question, that we can interfere with a finding or verdict in favor of the plaintiff as a matter of law. To interfere in doubtful cases is to encroach upon the province or functions of the jury, which we have no right to do. The foregoing propositions have so often been passed upon, and the decisions upon them are so numerous, that we deem it wholly unnecessary to refer the reader to any of them. He may find many of them by the slightest effort. In view of what has been said, therefore, the court committed no error in denying the motion for nonsuit.

This brings us to the exceptions to the court's charge to the jury. The appellant excepted to the italicized portions of the following instructions:

*"The duty of a master toward a servant in his employ is to exercise reasonable and ordinary care and skill to provide safe machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in safe condition for* 5 *such use, including the duty of making inspections, tests and repairs at proper intervals while the work progresses."*

And further:

*"An employee is required to observe and avoid all known perils, or conditions such as would, upon ordinarily careful observation, convince an employee of ordinary intelligence and prudence, of danger, even though they may arise from a defect in the machinery or appliance which he is using; but he is not bound to search for defects, or to make a critical inspection of the appliances which are provided for his use. These are the duties of the employer, who is required not only to furnish reasonable, safe, and suitable tools and machinery, but to exercise such a continuing supervision over them by such reasonable, careful and skillful inspection and repairs as will keep the appliances which the employee is required to use in*

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*such a condition as not to expose him to extraordinary danger."*

Counsel now urge that the portions of the charge we have italicized are outside the issues, and hence were improper. In that connection it is contended that no issue was raised by the pleadings that appellant was required either to inspect the machinery on the derrick, or that there was a failure to do so. It is true that the respondent in his complaint did not allege that appellant had failed in that regard, nor that such failure, if it in fact existed, in any way contributed to the accident and consequent injury complained of. During the trial, however, and especially on appellant's cross-examination, much was said about those matters, and the court, for that reason, no doubt, was induced to charge the jury as it did upon that subject. As a general rule, the court should confine the instructions to the jury to the issues presented by the pleadings, and to depart from that rule may not only be erroneous, but it may, under certain circumstances, constitute prejudicial error. Whether the latter is the case, however, depends upon the evidence produced by the parties, as well as upon the particular circumstances of each case. We think that, inasmuch as both parties went into those matters on the trial of the case, and especially since the appellant did so very fully, that the matters excepted to did not and could not have misled the jury to appellant's prejudice. While the statement made by the court that it is the duty of the master "to exercise a continuing supervision over them," that is, over the tools, appliances and machinery furnished by the master, when applied to the facts of this case, is somewhat strong, yet, in view of the whole charge, when considered in the light of the evidence, we are constrained to hold that the jury were not misled thereby. We think what the court meant by the term "continuing supervision" was not that the master was compelled to maintain a watch or supervision constantly, that is, at each moment or even hour of time, but, by keeping in view all that was said by the court, what was meant was that a reasonable supervision, that is, an examination or inspection, at reasonable intervals of time only was required. If such a construction is permissible, and we think

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it is—indeed, we think it is the only reasonable one under all the circumstances—then what the court said was not misstating the master's duty. We are of the opinion, therefore, that in view of all the evidence and the whole of the charge we are not authorized to interfere with the judgment for the reason last stated.

Nor was appellant prejudiced by the court's refusal to charge as requested. Really no request was refused which covered any feature or phase of the case not sufficiently covered by the court's charge. Indeed, every phase of the case was fully covered by the court's charge, and, that being so, it would have subserved no good purpose to have given additional requests upon the subjects already covered.

For the reasons stated, the judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

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MORAN v. KNIGHTS OF COLUMBUS.

No. 2733. Decided July 12, 1915. (151 Pac. 353.)

1. **INSURANCE—ACTION ON CERTIFICATE—PLEADINGS—PARTIES.** In an action to recover on a benefit certificate, where plaintiff alleged that after its issuance she had become the wife of insured and, by virtue of defendant's by-laws, the beneficiary in such certificate, and that insured had thereafter died while the certificate was in effect, and wherein defendant denied any knowledge concerning the matrimonial relations of plaintiff and insured, and alleged that insured was not a member in good standing at his death because of failure to pay his assessments, the question whether plaintiff was the real party in interest was not properly raised. (Page 408.)
2. **INSURANCE—ACTION ON CERTIFICATE—REPLY—STATUTE.** Under Comp. Laws 1907 Section 2980, as amended by Laws 1907, c. 39, providing that a party who confesses the facts pleaded in an answer, but desires to avoid the legal effect thereof, must file a reply, plaintiff, suing as the widow of an insured to recover upon his benefit certificate, and alleging that insured had died

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a member in good standing while the certificate was in effect, upon defendant's answer, alleging a by-law that no benefit should be paid to the beneficiary of any member whose death was caused by his own act unless the one claiming the benefits should affirmatively show that prior to such suicide insured had been judicially declared insane, was under treatment for insanity, or was in the delirium of other illness when the act was committed, was not required to reply, in order to make her evidence respecting insured's mental condition at and immediately before his death admissible. (Page 408.)

3. **APPEAL AND ERROR—HARMLESS ERROR—PLEADINGS.** In such case, where it was clear that, even though a reply should have been filed, the omission to do so had in no way prejudiced defendant, a judgment for plaintiff would not be reversed for failure to file a reply. (Page 408.)
4. **INSURANCE—PROOFS OF DEATH—WAIVER.** An insurer who unconditionally denies all liability on a policy sued on waives a condition in the policy requiring proofs of death.<sup>1</sup> (Page 409.)
5. **INSURANCE—ACTION ON BENEFIT CERTIFICATE—EVIDENCE.** In an action by plaintiff as the widow of an insured to recover on his benefit certificate, a document purporting to be proofs of death, submitted to the insurer on behalf of insured's father by the local council, and with which plaintiff was in no way connected, was properly excluded. (Page 409.)
6. **INSURANCE—ACTION ON CERTIFICATE—QUESTION FOR JURY—MENTAL CONDITION OF INSURED.** In such action, where the evidence upon the issues of insured's suicide and his mental condition at the time was not such as allowed but one conclusion, but was such that reasonable men might arrive at different conclusions, the issues were properly submitted to the jury. (Page 410.)
7. **INSURANCE—FORFEITURE—NONPAYMENT OF PREMIUMS—ENFORCEMENT.** Under the constitution and by-laws of a fraternal benefit association, providing that any member should *ipso facto* forfeit his membership by failing to pay his regular monthly assessments within thirty days from the first day of the month in which they were levied, that no money should be paid from the treasury of any council, except upon a two-thirds vote at a regular meeting following written notice of a resolution or intention to pay, that a council might authorize the payment of a member's assessment as a loan or gift from its general fund, not to exceed six assessments, payable to the financial secretary within the time fixed for such payment, that every by-law of a council authorizing payment of a member's assessment should

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<sup>1</sup>*Danther v. Grand Lodge*, 10 Utah, 123, 37 Pac. 245; *West v. Insurance Society*, 10 Utah, 442, 37 Pac. 685.

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be approved by the board of directors, and that a subordinate council might make necessary by-laws not to conflict with the constitution and regulations made by the national council, the association, as to a member who was an officer of a local council at a monthly salary of about \$10, whose assessment account sometimes remained uncredited on the books of the local council, during which time the local council had paid his assessments from its funds within the time given by the by-laws, who was never reported delinquent and was always recognized as a member in good standing, and who for five years prior to his death paid all assessments regularly and who, at his death had paid all assessments, could not enforce the provision of strict forfeiture for default in the payment of assessments. (Page 410.)

8. **INSURANCE—CONSTRUCTION AGAINST FORFEITURE.** Equity and good conscience abhor forfeitures, and the courts will construe transactions so as to avoid a forfeiture where such construction is permissible, which rule applies to insurance contracts as well as to others, and it is immaterial whether the transaction is one in equity or at law, since Comp. Laws 1907, Section 2489, provides that, whenever there is any variance between the rules of equity and those of common law in reference to the same matter, the rules of equity shall prevail.<sup>2</sup> (Page 410.)
9. **INSURANCE—FORFEITURE—WAIVER.** Where a forfeiture is insisted upon by an insurer, it is bound to inform itself respecting its rights in that regard within at least some reasonable time or be deemed, as a matter of common justice, to have waived its rights to a forfeiture. (Page 410.)
10. **PRINCIPAL AND AGENT—ACTS OF AGENT—REPUDIATION OR RATIFICATION.** A principal must at some point of time ascertain whether the business acts of his agent are authorized, and, in case there is neither fraud, concealment, nor misrepresentation, and the rights of third persons are involved, must assert his right to repudiate unauthorized acts within a reasonable time or remain silent. (Page 418.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by Mary Moran against the Knights of Columbus.

Judgment for plaintiff. Defendant appeals.

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<sup>2</sup>*Johanson v. Grand Lodge*, 31 Utah 45, 86 Pac. 494.

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AFFIRMED.

Geo. J. Gibson for appellant.

A. G. Horn for respondent.

## APPELLANT'S POINTS.

A member of a fraternal benefit society is bound by subsequently enacted by-laws or alterations in those previously existing, but such by-laws or alterations will be given a prospective operation unless it clearly appears that they were intended to operate retrospectively. (*Maynard v. Locomotive Engineers' Mut. L. etc. Ins. Assoc.*, 14 Utah 458, 47 Pac. 1030; *Roberts v. Cohen*, 70 N. Y. Supp. 57; affirmed, 173 N. Y. 580, 65 N. E. 1122; *Emmons v. Supreme Conclave I. O. H.*, 63 Atl. 871; *Berlin v. Eureka Lodge*, 132 Cal. 294, 64 Pac. 254; *Wist v. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Pac. 610; *Caldwell v. Grand Lodge*, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. N. S. 653.)

Where a written contract refers to an instrument specially identified as a part of the contract, the instrument is admissible in evidence whether it tends to make the whole contract ambiguous or not, and to exclude the instrument is in ordinary cases prejudicial error. (*United Iron Works v. Outer Harbor Dock and Wharf Co.*, 141 Pac. 917; *Ins. Co. v. Sailer*, 67 Pa. St. 108.)

The burden of proof is on the plaintiff to show that the insured was insane at the time of the act which caused his death; this being true where insanity is pleaded to offset suicide, the more true is it where, as in this case, the by-law making delirium of other illness an offset to suicide expressly states that the same must be affirmatively proved; a reply therefore should have been filed. (*Hopkins v. N. W. Life Ass. Co.*, 94 Fed. 729; *Dickerson v. N. W. Mut. L. Ins. Co.*, 200 Ill. 270, 65 N. E. 694; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 857.) Proofs of death are admissible as admissions by the beneficiary; the effect thereof is to make a *prima facie* case of the truth of the facts stated therein.

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(*Beard v. Royal Neighbors of America*, 99 Pac. 83, 53 (Oregon) 102; *Ins. v. Newton*, 22 Wall. 32, 22 L. Ed. 793; *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 857; *Voelkel v. Supreme Tent K. M. W.*, 116 Wis. 202, 92 N. W. 1104; Jones Commentaries [Blue Book of Evidence], Section 270.) A denial of liability in order to be a waiver of proofs of death must have occurred during the time within which the beneficiaries were required to act, so that they might reasonably infer that the insurer did not intend to rely upon failure to furnish proper proofs. (*Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 857; *Westchester Fire Ins. Co. v. Coverdale*, 58 Pac. 1029 [Kansas]).

The receipt by the supreme body of a fraternal benefit society of money from a local lodge to pay the assessments of a member *ipso facto* suspended when the same is an advancement by the lodge does not estop it from contesting liability on his certificate because of his non-payment of assessments. (*Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223.) This is a construction of the same by-laws involved in this case by the Supreme Court of the state of the incorporation of the defendant and is immeasurably stronger as against the plaintiff than is this case. To the same effect: *Knights of Columbus v. Burroughs*, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246; *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369; *Lyon v. Supreme Assembly*, 153 Mass. 83.

The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members. (Laws of Utah, 1911, Chapter 148, Section 20; *McCoy v. R. C. Mut. Ins. Co.*, 152 Mass. 272; *Kocher v. Supreme Council Cath. Ben. Legion*, 65 N. J. Law 649; *Loeffler v. Mod. Woodmen of Am.*, 100 Wis. 79.) The last case is a discussion of waiver where the insured himself occupied the office corresponding to that of financial secretary in the defendant society.



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The member is presumed to know limitation of agent's authority. (*Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308.) That the charter, constitution, laws and application of membership together with the benefit certificate constitute the contract of insurance in a fraternal benefit society really needs no citation of authorities. (Laws of Utah, 1911, Chapter 148, Section 8; *Sterling v. Head Camp*, 28 Utah 505, 80 Pac. 375; Same case, 28 Utah 526, 80 Pac. 1110.)

#### RESPONDENT'S POINTS.

To avoid a policy on the ground of suicide, it must be shown that the suicide was the voluntary act of a sane man. In other words, intentional and voluntary self-destruction is meant and not death from accident or unexpected causes. (*Insurance Co. v. Haselett*, 105 Ind. 212, 4 N. E. 582; *Ins. Co. v. Graves*, 69 Ky. 268; *Pierce v. Ins. Co.*, 34 Wis. 389; *Phillips v. Ins. Co.*, 26 La. Ann. 404; *Fowler v. Ins. Co.*, 4 Lans. 202; *Edwards v. Ins. Co.*, 20 Fed. 661; *Keels v. Life Ass'n.*, 29 Fed. 198; *Ins. Co. v. Naugle*, 130 Ind. 79, 29 N. E. 393; *Penfold v. Ins. Co.*, 85 N. Y. 317; *Ins. Co. v. Payne*, 105 Fed. 172; *Co. v. Crayton*, 70 N. E. 1066 [Ill.]; *Ins. Co. v. Brignac*, 36 So. 595; *Ins. Co. v. Nicklas*, 41 Atl. 906; *Burnham v. Company*, 75 N. W. 445 [Mich.]; *Brown v. Ins. Co.*, 57 S. W. 415 [Tenn.]).

The pleadings show that the defendant denied all liability on the policy sued on and the plaintiff was not required to show any compliance with any of the conditions subsequent to the death of the deceased. This has been before this court on numerous occasions and on all occasions this court has held that where the defendant denies all liability proofs of loss are not necessary and are dispensed with, and that the defendant cannot complain that the same was not proven. (*Daniher v. Lodge*, 10 Utah 110; *West v. Ins. Co.*, 10 Utah 442; *Stephens v. Ins. Co.*, 16 Utah 22.)

FRICK, J.

This action was commenced by the plaintiff as the widow of one William J. Moran, deceased, late of Ogden, Utah, to

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recover upon a life insurance policy or so-called benefit certificate issued by the defendant, whereby it insured the life of the deceased for the sum of \$1,000. It is not necessary to set forth the allegations of the complaint in detail. It is sufficient to state that the plaintiff, in substance, alleged that the defendant is a corporation, and that in September, 1904, it duly executed and delivered to the deceased, a single man, a certain policy of insurance, hereinafter called a benefit certificate, whereby it agreed that in case of the death of the deceased it would pay to his father said sum of \$1,000; that thereafter the plaintiff and the deceased intermarried and became husband and wife; that by virtue of said marriage, and as such wife, under and by virtue of the by-laws of the defendant which were pleaded, she became the beneficiary in said benefit certificate and was entitled to the \$1,000 named therein; that the insured died on the 22d day of June, 1913, and at the time of his death was a member in good standing of the defendant corporation, and said benefit certificate was in full force and effect; that said defendant was notified of the death of said deceased, and it refused to pay said insurance money "and has absolutely denied liability" under said benefit certificate; that if an unmarried member married after he became such member, such marriage constituted the wife his beneficiary without further designation by him; that the plaintiff had fully complied with all the provisions of the constitution, by-laws and rules and regulations of the defendant and all the conditions on her part to be performed.

The defendant in its answer admitted its corporate existence, but denied any knowledge concerning the death of the deceased, and also denied any knowledge "concerning the matrimonial relations" of plaintiff and the deceased. The defendant also admitted the existence of the by-laws pleaded by the plaintiff relating to the effect of her marriage with the deceased. The defendant then, with much particularity, set forth that it is a fraternal and benevolent association with certain laws, rules and regulations which govern and are imposed upon members, large portions of which are pleaded. It then affirmatively alleged as follows:

"That between the times in said complaint mentioned,

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to wit: between the making of the contract aforesaid and the alleged death of said William J. Moran, the said Moran did on divers occasions fail, neglect and refuse to pay his said regular monthly assessments within thirty days from the first day of the month in which said assessments were respectively levied, and that the said William J. Moran was not a member of the defendant society at the time of his death as alleged, by reason of his failure to comply with the laws requiring payment of insurance assessments, and that said Moran had *ipso facto* forfeited his membership by non-payment of such assessments, in accordance with the laws of the defendant society, and had not been reinstated; that the cause of the death of said William J. Moran was suicide; and that under the laws of the defendant society his beneficiary is not entitled to receive the death benefit by reason of the cause and nature of the death of said Moran, said death being caused by his own act."

The defendant also admitted that it had denied liability under the benefit certificate, and denied all the allegations of the complaint "not specifically admitted."

When the case was called for trial, the defendant also offered to return to the plaintiff "any and all insurance assessments \* \* \* from and after the time that said William J. Moran did *ipso facto* forfeit his membership in said order by reason of his failure" to pay his assessments.

Upon substantially the foregoing issues, the parties proceeded to trial. The plaintiff produced, and, over the objections of the defendant, was permitted to introduce in evidence, the benefit certificate in question. Plaintiff proved that she and the deceased were married; that he died on the 22d day of June, 1913; and that at that time they were husband and wife. She also produced and introduced in evidence a receipt signed by the financial secretary of the local council of which the deceased was a member, dated June 16, 1913, whereby it was acknowledged that the deceased had paid his dues and assessments up to the 1st day of that month, which kept him in good standing during the whole of that month, and that the defendant had received notice of the death of the deceased, and that it had unconditionally rejected plaintiff's claim and

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denied all liability under said benefit certificate. It was also shown by the testimony of the financial secretary that the deceased, at the time of his death, was a member in good standing so far as the payment of current dues and assessments was concerned.

After having submitted the foregoing evidence, the plaintiff rested. The defendant then moved for a nonsuit for the reason that the plaintiff had failed to prove that she had submitted proofs of death. Plaintiff's counsel contested the motion upon the ground that in denying unconditionally liability under the benefit certificate the defendant had forfeited or waived its right to insist upon proofs of death. The court so ruled and denied the motion.

The defendant then produced in evidence certain portions of the constitution and by-laws of the defendant. The parts introduced in evidence are quite voluminous, and we shall only insert those parts here which we deem material to an understanding of this decision. They are as follows:

"Any member of this order shall *ipso facto* forfeit his membership in the order: Who fails, neglects or refuses to pay his proportionate part of any assessment for thirty days from the date of mailing or transmitting the notice of assessment by the secretary of his council, or of the regular monthly assessment, within thirty days from the first day of the month in which levied. \* \* \* No money shall be paid or transferred from the treasury of any council (except such moneys as the council is called upon to regularly pay for its current expenses and as provided by the laws of the order, or for purposes approved by the national council or board of directors) unless by a two-thirds vote of the members present and voting at a regular meeting held subsequent to a regular meeting at which notice in writing of a resolution or intention to pay or transfer such money and the purposes and amount to be paid or transferred shall have been given and regularly read. \* \* \* A council may authorize the payment of a member's assessment as a loan or gift, from its general fund, to a member not to exceed six assessments, but such payment must be made to the financial secretary before the time fixed for such payment to avoid suspension under the law. Every

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by-law or standing resolution of any council authorizing the payment of a member's assessment as a loan or gift from its general fund, as herein provided, shall be submitted in duplicate to, and approved by the board of directors before it shall become operative. \* \* \* If the financial secretary shall omit to pay, within the prescribed time, an assessment for a member, in compliance with such resolution or by-law, the member stands suspended at the expiration of the time for payment. \* \* \* A subordinate council may make and promulgate for its own government such by-laws, rules and regulations as it may find necessary for the proper conduct of its affairs, provided that no by-laws, rules or regulations shall be enacted which shall conflict with, or be in opposition to, or in any way impair the enforcement of the constitution, rules and regulations made or enacted, or which may be made and enacted by the national council, or directors of the Order of the Knights of Columbus. \* \* \* No benefit shall be paid to the beneficiary \* \* \* of any deceased member \* \* \* if such deceased person was prior to the time of his death *ipso facto* or otherwise suspended or expelled by the laws of the order and not reinstated according to the laws of the order; or if the death of such member has been caused by his own act, unless the person or persons claiming by certificate or membership shall establish and prove affirmatively that prior to such suicide the member had been judicially declared insane, or was under treatment for insanity at the time the act was committed, or was then in the delirium of other illness."

The defendant also produced other evidence tending to show that the deceased had committed suicide by taking carbolic acid. It also submitted evidence to the effect that after the deceased was accepted as a member he had forfeited said membership by failing or neglecting to pay his assessments as required by the constitution and laws of the defendant. In that connection, the books of the local council of which the deceased was a member and an officer, to wit: secretary, were produced, and from the entries therein it appeared that the deceased's account during the years 1905, 1906 and 1907 frequently remained unbalanced for several months at a

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time. That is, it appeared that the defendant was each month regularly charged or debited with his assessment and dues, but that the account was not credited monthly with payments, but only at intervals of two or more months and at intervals running as high as four or five months at a time up to the 1st day of January, 1908, when the account was credited with payment in full; and after that time, it seems, the deceased paid his assessments and dues regularly within the time required by the constitution and laws of the defendant. It was, however, also made to appear, from said books and otherwise, that during the time that the deceased was delinquent he was the secretary of the local council, and as such was receiving a salary of approximately ten dollars per month; that his assessments to the national council were always paid from the funds of the local council within the time required by the laws of the defendant; and that he never was reported to the national council or otherwise as having forfeited his membership, but was always treated and recognized by all as a member in good standing up to the time of his death. No evidence with respect to his delinquency was produced except what was made to appear from the entries in the books. The last which were introduced in evidence were made more than five years before the death of the deceased. Nor was there any independent evidence produced that he in fact was indebted to the local or national council in any sum or to any extent whatever except as shown by the books, and according to the entries therein he was in arrears for local dues and assessments to the national council as before stated.

The plaintiff contested the claim of suicide, and, over defendant's objections, was permitted to show, both on cross-examination of its witnesses and by her own witnesses on rebuttal, what the mental condition of the deceased was immediately before and at the time it is claimed he took the carbolic acid.

The defendant's counsel contend that the evidence is conclusive that the deceased took the carbolic acid with suicidal intent, while plaintiff's counsel contends that the inferences to be deduced from all the evidence point as strongly to an accidental as they do to an intentional taking of the poison,

and that the jury must have so found the fact, and, further, that although it were found that the deceased intended to take the poison, yet the evidence is to the effect that his act of taking it "was committed" when he was "in the delirium of other illness." Counsel for plaintiff therefore contends that, although the deceased died from the poison, yet that fact does not prevent her from recovering upon the benefit certificate.

The court submitted to the jury the question of whether the deceased had committed suicide, and the further question that, if they found that he had committed suicide, whether his act in doing so fell within the exception we have quoted from the laws of the defendant. The court took from the jury the question of whether the deceased had forfeited his membership for non-payment of dues and assessments, and ruled as a matter of law that under the undisputed evidence the deceased was a member in good standing at the time of his death. The only questions that were submitted to the jury were whether the deceased committed intentional suicide, and, if he did, whether his act was excused under the laws of the defendant. The jury found the issues in favor of the plaintiff, and the court entered judgment accordingly, from which the defendant appeals.

Numerous errors are assigned; but counsel, in their brief, have reduced them to a number of propositions which we shall now proceed to consider.

It is first contended that the plaintiff was not the real party in interest, and hence the court erred in permitting her to recover. There is no merit to this contention. Under the pleadings as they stood, the question of real party in interest, if it ever was a question under our Code, was not properly raised. 1

It is next contended that the court erred in admitting plaintiff's evidence respecting the deceased's mental condition at and immediately before his death for the reason that no issue was presented in that regard by the pleadings. It is contended that plaintiff's evidence upon that question was, in its nature, a confession of the defense of suicide pleaded in the answer and an attempted avoidance 2, 3

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thereof, in that the plaintiff undertook to prove that the deceased was not responsible for his acts. It is true that under our Code (Comp. Laws 1907, section 2980, as amended by Laws of Utah 1907, p. 38), a party who confesses the facts pleaded in an answer, but desires to avoid the legal effect thereof, must file a reply. While plaintiff's evidence in rebuttal apparently partook of the nature of an avoidance, yet that such was the case is more apparent than real. She did not confess that the deceased had committed suicide. What she really attempted was to negative and explain defendant's evidence upon that subject. In view of the whole pleadings, and in view of how the matter arose at the trial, we do not think a reply was necessary in this case. Moreover, it is as clear as it well can be made that, even though a reply should have been filed, yet the omission to do so in no way prejudiced the defendant. The judgment therefore cannot be reversed upon that ground.

It is also insisted that the court erred in submitting the case to the jury at all for the reason that the plaintiff failed to prove that she had submitted proofs of death. It is the settled law of this jurisdiction that, where the insurer unconditionally denies all liability under the policy sued on, he waives the condition in the policy requiring proofs of death. *Daniher v. Grand Lodge*, 10 Utah, page 123, 37 Pac. 245, and cases there cited; *West v. Insurance Society*, 10 Utah 442, 37 Pac. 685. 4

It is also contended that the court erred in excluding a certain document purporting to be proof of death which was submitted to the defendant on behalf of the father of the deceased by the local council. The plaintiff was in no way connected with that document, and hence could not have been bound by anything it contained or that was omitted therefrom. The court therefore did not err in rejecting the proposed evidence. 5

It is next urged that the court erred in its charge to the jury upon the question of burden of proof respecting the question of suicide and plaintiff's mental condition. The court not only complied with the settled law in that regard, but it strictly followed defendant's by-laws upon that subject.



In that connection it is also insisted that the court erred in submitting the questions of suicide and the mental condition of the deceased to the jury. It is contended that the court should have ruled as a matter of law that the deceased committed suicide and that the plaintiff could not recover for that reason. While the evidence upon those issues is not as satisfactory as it might be, and is such that if we were sitting as jurors we might, perhaps, have arrived at a different conclusion than did the jury, yet the evidence was sufficient to require a submission of those questions to the jury. The evidence is not such as permits of but one conclusion, but it is such that reasonable men might arrive at different conclusions, and hence was required to be submitted to the jury. In view that we are all agreed that under the evidence the case should have been submitted to the jury, we shall not set forth the evidence or even state the substance thereof. Under such circumstances, we must assume the responsibility of determining the question of the sufficiency of the evidence, and it could subserve no good purpose to set it out at length. The court committed no error either in submitting those questions to the jury or in charging them as already stated. 6

Finally, it is vigorously contended that the court erred in not ruling as a matter of law that the deceased had not complied with the laws of the defendant, in that he failed to pay his dues and assessments within the time required by said laws and for that reason had forfeited his membership. This is really the only serious question in this case. If it were not for two decisions, namely, *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223, and *Knights of Columbus v. Burroughs*, 107 Va. 671, 60 S. E. 40, 17 L. R. A. [N. S.] 246, which cases, it is insisted by defendant's counsel, are decisive of the last question, we would have little, if any, difficulty in disposing of the case upon what we consider well-settled legal principles. It must be conceded that in the first case cited, in which the lower court sustained a motion for judgment for the defendant upon the pleadings and which was upheld upon appeal, it was held that the payment of a member's assessment by a local council by a mere 7, 8, 9

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vote of the members of such council was illegal and did not prevent the *ipso facto* forfeiture of his membership, and hence when he was not during his lifetime reinstated as provided by the laws of the order his beneficiary, in case of his death, could not recover upon the benefit certificate issued by the defendant. The decision in the Virginia case, which was decided after the Connecticut case, is to the same effect. The facts in those cases were, however, materially different from those in the case at bar. Nor did the court in those cases, for reasons not disclosed, consider or pass upon, at least not directly, the by-laws of the national council authorizing the payment of members' assessments by local councils, nor the right of the local council to regulate its own affairs within certain limits. In the Virginia case the deceased had neglected to pay his assessments for five months immediately preceding his death, although frequently requested to do so by the secretary of the local council. The deceased had, however, never refused to pay them, and the local council, by a vote of the members, had timely and regularly forwarded the assessments to the national council so that the national body, who finally pays the money for death benefits, received every dollar that was coming to it, and the amount due from the deceased was also paid to the local council about four days before his death, so that the deceased was likewise not indebted to it at the time of his death, although the money was paid to and received by it at a time and under circumstances when the deceased could not have been reinstated under the laws of the order in force at the time. The Connecticut case in its legal aspect does not materially differ from the Virginia case. Counsel for defendant therefore contend that the legal effect of those decisions is that, in case a member fails or neglects to pay an assessment within the time required by the laws of the order, such failure *ipso facto* forfeits his membership, and the mere fact that the assessment is paid to the national council out of the treasury of the local council by a vote of the members thereof does not prevent a forfeiture of membership, and that unless such member is thereafter reinstated in accordance with the laws of the order his membership remains lapsed, and in case of death his beneficiary can-

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not recover. In view of the two decisions we have referred to, there seems much force to counsel's contention. In order to determine whether the case at bar should be ruled by those decisions or not, let us consider the undisputed facts developed in the case at bar in the light of the defendant's laws as we have heretofore set them forth.

One of the undisputed facts is that the deceased, at the time when the books of the local council show that he failed to pay his assessments promptly, was earning a salary which was payable out of the local treasury. Now we have seen that the local, or so-called subordinate council, had the right to promulgate by-laws, rules and regulations "for its own government" and "for the proper conduct of its affairs," so long as such laws, rules and regulations in no way conflicted with or impaired the laws of the national council or the enforcement thereof, which, of course, was paramount. While it is made reasonably clear that the national council by its laws undertook to control the subordinate or local council in applying its general fund for the payment of the assessments of its members, yet we can see nothing in the laws of the national council whereby the local council was prohibited from applying any money in its general fund to the payment of the assessment of a member or officer in case the council was indebted to such member or officer for salary or otherwise, if such a course was mutually agreeable. All we really have, therefore, is that, as a matter of bookkeeping, it is made to appear that while the deceased was earning a small monthly salary his assessment account at times remained unbalanced for some time, and that during all of which time the local council forwarded his assessments regularly and timely to the national council. While it is true that the general fund in the local treasury was guarded, if not entirely controlled, by the laws of the national council, yet, in so far as that fund was to be used in payment or discharge of some obligation or debt owing by the local council, it could pay or discharge the same in the manner its members saw fit, regardless of the laws of the national council, so long as the acts of the local council did not conflict with the laws of the national council. At least, so far as shown, there is nothing in the laws of the national

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council to the contrary. Moreover, under the local council's right to govern itself and to conduct its own affairs within the limits already stated, we can see no reason why it could not, out of its general fund, discharge any debt or obligation due to any member or officer, whether for salary or otherwise, by paying dues and assessments and charging him with the amount paid on his account with the local council. The only reason that is urged why the national council by its laws guards the general fund of the local councils is that there are two classes of members, one class which joins merely for social purposes, while the other class joins for both social and insurance purposes. The local general fund, it is contended, belongs to both classes, and hence, if that fund is paid for insurance purposes for one class of members contrary to the express provision of law, then the other class is prejudiced because the funds in which it has an interest are applied without authority of law and against its interests. But, as we have pointed out, the deceased was the secretary of the local council, and therefore served both classes alike and was entitled to pay proportionately from the funds belonging to both classes alike; and, if a part of the local council's general fund was thus applied in payment of the dues and assessments of the deceased while such council was indebted to him, the money was still devoted to a legal and proper purpose and not contrary to the laws of the national council, provided the local council received full credit for the money thus expended, and there is no claim that it did not. Indeed, it is undisputed that both the local and national councils received from the deceased every cent due from him in excess of his salary, and that during the last five and one-half years immediately preceding his death there is no claim that he was in arrears even as a matter of bookkeeping at any time or for any amount. The mere fact that the books of the local council may not contain a detailed recital of the foregoing transactions, and that they merely disclose that the deceased was debited with his monthly dues and assessments, and that he was not regularly or each month credited with payments on his account, in no way affects the legal status of the transaction; nor does it prove that the deceased or the local council

had transcended the law of the national council in what was in all probability done. We say in all probability because after the 1st day of January, 1908, or during the five and one-half years immediately preceding the death of the deceased, and during which time, it seems, he no longer continued to be secretary, he never was in arrears. The law always regards substance and not form in all matters of this character. Moreover, all transactions, under circumstances like those in this case, will be construed so as to avoid a forfeiture if such a construction is permissible under the evidence.

The foregoing are strong circumstances from which it may legitimately be inferred that while the deceased was secretary some arrangement either tacit or otherwise, existed between him and the local council with regard to the payment and crediting of his dues and assessments as indicated. Nor does the fact that the laws of the national council authorized the local council to pay a member's assessments as a "loan or gift from its general fund not to exceed six months," and that the general law further provided "every by-law or standing resolution of any council authorizing the payment of a member's assessment as a loan or gift from its general fund as herein provided shall be submitted in duplicate to and approved by the board of directors before it shall become operative," affect the foregoing conclusions. Indeed, when all the laws are considered together, the foregoing conclusions are strengthened rather than weakened. In this connection the laws also provide that, although the payment of assessments be duly authorized, yet, if they are not timely remitted to the national council, the member whose assessment is authorized to be paid out of the general fund will "stand suspended." It is thus manifest that what the national council insists upon is prompt payment of the assessments, and that the condition it imposes on local councils to guard their general funds are precautionary merely.

But it is contended by counsel for defendant that, inasmuch as it was not shown by plaintiff that a by-law or resolution was adopted and approved as required by the national council, therefore the payment, although authorized and made by the local council, was nevertheless void, and the deceased's mem-

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bership was forfeited. If such a contention were made on behalf of an ordinary insurance company after it had received payment of at least sixty-five monthly assessments after the alleged breach or forfeiture occurred and when it was clearly shown that it had always timely received every cent due to it from the insured, or from some one else in his behalf, no court would long hesitate in determining the result. Where, however, as here, the interests of a benevolent society composed of a large membership are involved, some courts, if we can judge from their decisions, seem to be inclined to hold that a forfeiture may be enforced not only for a failure to pay a current assessment, but that such may be done for a transaction, however remote, and where the member subsequently complied in full measure with all the conditions imposed except in not making a payment long in the past within the precise time required by the laws of the society. Indeed, it is contended that the Connecticut and Virginia cases are to the effect that the national council may go back any number of years and show that the member had failed to pay an assessment within the time required by its laws, and thus defeat the right of his beneficiary to recover, although the national council for years thereafter had received his assessments and had always treated him as a member in good standing. This, it is contended, can be done so long as it is not made to appear that the national council is for some reason estopped from claiming and enforcing the forfeiture. We cannot subscribe to such a doctrine. While we do not question the right of the national council to insist upon a compliance, yes, even with a strict compliance of its laws, rules and regulations, yet we do not concede that either under legal or equitable principles, it may at any time, however remote from the act, still enforce a forfeiture. It is no answer to say that its officers did not know of the breach of the member. Where forfeitures are insisted upon by individuals or associations, they are bound to inform themselves respecting their rights in that regard within at least some reasonable time, or be deemed, as a matter of common justice, to have waived the right to a forfeiture.

The contention is, however, made that in this case the deceased's membership was *ipso facto* forfeited. But what sig-

nificance is to be given to that? Will any lawyer seriously insist that one for whose benefit the right to insist upon a forfeiture is given by contract may not be deemed to have waived such right? Does it make any difference whether the right is to be exercised by an individual or an association? Will it further be contended that such individual or association may continue to receive the fruits of such a contract and, notwithstanding that, may insist upon the forfeiture provided for therein regardless of how long a time has elapsed between the time the act giving rise to the forfeiture has occurred and the time the forfeiture is insisted upon? We refrain from answering the questions, since the answer in each instance is self-evident. Upon the question of whether a benevolent association may not through laches or by lapse of time be deemed to have waived a forfeiture, see note to *Royal Guardians v. Clarke*, Ann. Cas. 1914, C. 437, and *Trotter v. Grand Lodge*, 11 Ann. Cas. 539. Can it successfully be contended therefore that because a member of an association (whose membership may have extended over a period of twenty or thirty years) in his first or second year, or in any one of the early years of his membership, failed to pay an assessment promptly within the time it was required to be paid, his beneficiary on his death can be met with the claim that no recovery can be had because of a failure to pay the assessment aforesaid, notwithstanding the fact that, during all of those years after the first lapse, the member promptly paid and the association received all dues and assessments and treated him in all respects as a member in good standing? Add to the foregoing, also, that the association made no claim that the assured could not and would not have been promptly reinstated if the forfeiture of his membership had been insisted upon within a reasonable time, and that to insist upon the forfeiture, as was done in this case, would have left the deceased helpless and now leaves the beneficiary in like condition. Equity and good conscience always have abhorred forfeitures and courts are loth to enforce them unless compelled to do so. The rule applies to insurance cases as well as to others. This court is firmly committed to that doctrine. *Johanson v. Grand Lodge*, 31 Utah

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45, 86 Pac. 494, and cases there cited. Moreover, our statute (Comp. Laws 1907, section 2489) provides:

“Wherever there is any variance between the rules of equity and the rules of common law, in reference to the same matter, the rules of equity shall prevail.”

It matters not therefore, in this jurisdiction, whether the action is one in equity or one at law; the rules of equity respecting forfeitures must prevail. It seems to us that both the laws of the national council as well as the undisputed facts bring this case squarely within the principles we have just discussed. If a forfeiture can be enforced in this case, we can see no reason why it should not be enforced in every case where a member omitted to pay an assessment promptly within the time fixed by the laws of the order, although he made timely arrangement with his local council to pay the same and it was in fact timely paid to the national council. We think that, under the undisputed facts, the District Court did not err in ruling that the claim of forfeiture was stale and not enforceable. If, however, the transaction here in question be viewed in the light of the familiar principles which pertain to the relationship of principal and agent, then again the result must be the same. If it be assumed that in paying the assessment in question the local council was the agent of the deceased, then it in fact did no more than pay the amount of the assessment for him to the national council, and in view that it did so timely we cannot see how the national council can complain, although it in no way was bound by the act of the local council. If, upon the other hand, it is assumed that the local council was the agent of the national council, and in what was done the local council transcended its authority and thus did not bind its principal, how can the national council complain? The national council certainly received all that it was entitled to, and received it within the time fixed by its own laws.

Must not a principal at some point of time ascertain whether the business acts of his agent were authorized, and in case there is neither fraud, concealment nor misrepresentation, and the rights of third persons are involved, must not such prin-



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principal assert his right to repudiate unauthorized acts within a reasonable time or remain silent with respect thereto?

Would a court of justice for a single moment listen to the principal who invoked its aid to enforce a forfeiture which he claimed was based upon a prior unauthorized act of his agent which had taken place more than five years previous and which act was fair and free from all fraud, misrepresentation and concealment and entered into in good faith by all concerned, and where such principal has received all that he was entitled to just as though the act complained of had been authorized? Of course, the claim here is that the principles just discussed do not apply because it was the duty of the deceased as well as of the local council to obey and abide by the laws of the national council. Grant that. It was, however, also the duty of the national council to act within a reasonable time or thereafter hold its peace. If the contention made in this case shall prevail, we know of no limit of time within which any forfeiture which is based upon the failure to strictly comply with some governing by-law, rule or regulation may not be enforced. A rule which would effectuate such forfeiture is so far-reaching that the ordinary mind cannot grasp all the results that might flow therefrom. Courts may not apply one principle to one kind of insurance or action, and another to another kind of insurance or action. In all kinds of insurance contracts, non-payment of premiums, assessments, or dues, call them what you will, involve forfeitures. The law which limits the enforcement of forfeitures where all have acted in good faith, within the narrowest limits has been well, and as we think, correctly, established by the courts. Forfeitures for long-past acts or omissions, which leave the insured and the beneficiary alike helpless, are just as odious if exacted by a benevolent society as if sought to be enforced by the most grasping corporation. In no case should forfeitures be enforced by the courts except where the contract of the parties, the law applicable thereto, and justice permit no other course. We desire to add that we do not hold that a forfeiture may not be insisted upon in any case after this association has received assessments from a

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member, but what we hold is that, under the facts and circumstances of this case, a forfeiture may not be enforced.

For the reasons stated, the judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

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JONES, et al., v. FOULGER, City Treasurer, et al.

No. 2737. Decided July 12, 1915. (150 Pac. 933.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—NOTICE OF MANDAMUS. Comp. Laws 1907, section 273, provides that before the levy of any taxes for public improvements, the city council shall publish notice of intention to levy such taxes, which notice shall describe the improvements proposed and the boundaries of the district to be affected or benefited by the improvement. The city council gave notice of its intention to open an avenue, and defined the district affected to be the whole of the avenue for a certain distance and a strip forty-eight feet in width on each side, when opened as proposed, and abutting thereon, and declared the district to be benefited and taxed for such improvement to be a strip of land forty-eight feet wide abutting on the east side of such avenue, described by metes and bounds, and a strip of the same width abutting on the west side described by metes and bounds. *Held*, that the notice of intention was jurisdictional, and that the plaintiffs' property not necessarily included in the general description and expressly excluded by the specific description, could not thereafter be legally assessed by an amendment to the tax ordinance so as to include it without a new notice of intention.<sup>1</sup>

Appeal from District Court, Second District; *Hon. N. J. Harris*, Judge.

Action for injunction by Edgar Jones and others against Wallace Foulger, City Treasurer of Ogden City, and Ogden City.

Judgment for plaintiffs. Defendants appeal.

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<sup>1</sup>*Armstrong v. Ogden City*, 9 Utah, 255, 34 Pac. 53.

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Jones et al. v. Foulger et al., 46 Utah 419.

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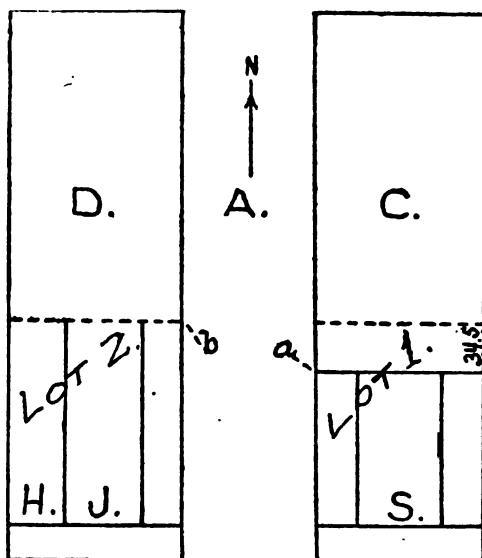
**AFFIRMED.**

*Valentine Gideon* for appellants.

*J. E. Bagley* and *J. D. Murphy* for respondents.

**FRICK, J.**

The plaintiffs, Jones, Spiers, and Houtz, commenced this action in the District Court of Weber County to restrain the defendant Foulger, as treasurer of Ogden City, and said city from collecting a certain special tax assessed against the property of the plaintiffs for the purpose of making a public improvement, to wit: to open up a street, and to have said tax declared void. The defendants answered the complaint, and averred that the tax in question was legally and regularly assessed as required by law, and hence was a valid tax. The facts are simple and undisputed. We append the following plat upon which the property in question is shown, and reference thereto will lead to a better understanding of the questions involved here:



The strip marked "A" on the plat represents Hudson avenue, which is the strip referred to in the notice of intention

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published by Ogden City hereinafter set forth. Hudson avenue in fact extends considerably farther north than is shown on the plat. The parcels marked "H," "J," and "S," respectively, are owned by the plaintiffs, the parcel marked "H" being owned by the plaintiff Houtz, the parcel marked "J" by the plaintiff Jones, and the parcel marked "S" by plaintiff Spiers. On August 28, 1909, Ogden City published its notice of intention to make a public improvement, to wit: to open a street through a certain block in said city to be named Hudson avenue, as shown on the foregoing plat. In view that the notice of intention is claimed to be jurisdictional; and since it constitutes the bone of contention here, we give it in full. It reads as follows:

"Notice is hereby given by the city council of Ogden City, Utah, of the intention of such council to make the following improvements, to wit:

"To open Hudson avenue through block twenty-five (25), plat 'A,' Ogden City survey, sixty (60) feet wide through the center of said block twenty-five (25), the whole distance from Twenty-Fourth to Twenty-Fifth streets, said avenue to be thirty (30) feet in width on either and both sides of the center line of said block.

"The estimated cost of said improvements is \$100,000. "

"The district affected by said improvements is the whole of said Hudson avenue to be opened and a strip of land forty-eight (48) feet in width on either and both sides of said avenue when opened as proposed, and abutting thereon.

"For the payment of the costs and expenses of making said improvements the city council intends to levy and collect special and local taxes upon the lots, blocks, parts of lots, blocks, lands and real estate lying and being within the boundaries of the district benefited and affected, to the extent of the benefits to said property by reason of said improvements.

"The district to be benefited and affected by said improvement and taxed to pay the costs and expenses of same is a strip of land forty-eight (48) feet wide abutting on the east side of said Hudson avenue when opened as proposed, beginning thirty-four and five-tenths (34.5) feet south of

the north line of lot one (1), and running thence north to the south line of lot seven (7); and a strip of land forty-eight (48) feet wide abutting on the west side of said Hudson avenue when opened as proposed, beginning at the north line of lot two (2) and running thence north to the south line of lot six (6), all in said block twenty-five (25).

"The city council will, on Monday, the 20th day of September, 1909, at 8 o'clock p. m., in the city council chamber, City Hall, Ogden, Utah, hear objections in writing from any and all persons interested in said local and special assessment."

It will be observed that the notice contains both a general and specific description of the property to be affected and benefited by the improvement. In the general description which immediately follows the statement of the estimated cost of the proposed improvement, it is stated that the property or—

"district affected by said improvements is the whole of said Hudson avenue to be opened and a strip of land forty-eight (48) feet in width on either and both sides of said avenue when opened as proposed, and abutting thereon."

Another description follows the foregoing by which the property or "district to be benefited and affected by said improvements and taxed to pay the costs and expenses" thereof is more specifically described. The property to be assessed to defray the costs of the improvement, according to the specific description begins at the point marked "a" on the plat, which is part of lot 1, and from that point runs north (away from the plaintiff Spiers' property) to the "south line of lot 7," which line is to the north of the property indicated on the plat. Beginning, therefore, at said point "a" a strip of ground forty-eight feet wide along the east side of Hudson avenue, and which is a part of the land marked "C" on the plat, is included; while the description on the west side of said avenue begins at the point marked "b" on the plat and "running thence north to the south line of lot 6," which description covers the east forty-eight feet of the strip marked "D" on the plat all of which lies north of any land owned by either of the plaintiffs. After the foregoing notice of intention was

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published and in pursuance thereof, as required by our statute, the city council of Ogden City duly passed an ordinance by which a special tax was levied to pay the cost and expenses of said improvement upon the property contained in the specific description we have just given and excluding the property of all of the plaintiffs. Pursuant to that ordinance, and as required by law, a board of equalization was formed, which duly published notice of its sittings and at said sittings heard all complaints respecting the equality of the proposed assessments upon the abutting property contained in said specific description. That board, however, on June 18, 1910, held that the property of the plaintiffs herein was benefited by the proposed improvement, and recommended that the same be assessed with the abutting property. The city council adopted the recommendation of said board, and, on the 21st day of June, 1910, passed an ordinance by which it "amended" its original ordinance in which it had levied the special tax, and in the amended ordinance the property of the plaintiffs was included and likewise assessed. It is the special tax imposed by the amended ordinance that is in question here and which, it is contended, is void.

The plaintiffs contended in the court below that, inasmuch as their property was excluded from the notice of intention and from the original ordinance, the city council exceeded its authority in levying the special tax in the amended ordinance. In other words, they contend that under our statute the notice of intention is jurisdictional, and that property not included within that notice cannot thereafter be legally assessed unless a new notice of intention be published, as required by our statute. The lower court so ruled and pursuant thereto entered judgment declaring the tax void, and permanently enjoined the defendants from collecting the same. Our statute, Com. Laws 1907, section 273, relating to the giving of notice of intention to levy special taxes for improvements provides as follows:

"In all cases before the levy of any taxes for improvements provided for in this chapter, the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published

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at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements, the estimated cost of such improvements, and designate a time when the council will consider the proposed levy. If, at or before the time so fixed, written objections to such improvements signed by the owners of two-thirds of the front feet abutting upon that portion of the street, lane, avenue, or alley to be so improved, be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

\* Appellants rely on the case of *Armstrong v. Ogden City*, 9 Utah 255, 34 Pac. 53, where the question of the sufficiency of the notice of intention under section 273, *supra*, was passed on. There is nothing in that case which lends any color to the claim that the notice of intention is not jurisdictional, or that the property sought to be assessed for the proposed improvement need not be included in such notice by at least a general description, that is, by at least correctly stating the boundaries of the district so that the owner of property may know whether it will be claimed that his property is benefited or not. We think that the decision in that case sustains the plaintiff's, rather than appellant's, contention. Where a statute requires that before levying special assessments notice shall be published, and prescribes what such notice shall contain, the courts generally hold that the giving of such notice is jurisdictional, and must substantially be complied with in order to authorize the levying of the special assessment. 4 McQuillin, Mun. Corps. Sections 1849-1852; Hamilton, Law of Special Assessments, Sections 141, 142, 145. The diversity among the decisions is not with respect to the giving of notice, but there is a marked difference among them with respect to the sufficiency of the notice where notice is given. Appellants do not contend that the statutory notice can be omitted, nor that such a notice is not jurisdictional, but their contention really is that the notice of intention as published in this case included the property of the plaintiffs, and is therefore sufficient. We are of the opinion, however, that under the most elementary rules of construction the property

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of the plaintiffs must be excluded from the notice as published. The most that can be claimed for the notice is that if the general description is examined only from one point of view, it may be claimed, with some show of reason, that the property of the plaintiffs was included. It must, however, also be said that if the general description is considered from every angle as it must be, their property is not necessarily included even within the general description. If, however, we have recourse to the specific description of the property covered in the notice, then the property of the plaintiffs is, in express terms, excluded. Again, even in the general description, the property in the notice is limited to such as is "abutting thereon," that is, abutting on Hudson avenue, the street which was to be opened. By referring to the plat it will be seen that plaintiffs' property did not actually abut, that is, adjoin the proposed street. We need not pause now, however, to determine what property is "bounding, abutting or adjacent" on or to a contemplated improvement within the purview of our statute. It is sufficient now to determine that the description contained in the notice of intention clearly and manifestly did not include the property of the plaintiffs as abutting property. That was also the view of the board of equalization, and likewise of the city council when the original ordinance was adopted. Had the city council thought that the property of the plaintiffs was included in the notice of intention, it would have levied the special tax thereon in the original ordinance, and no "amended" ordinance would have been necessary. We thus have a clear case where by a general statement something may be deemed to be included which by a particular statement is, however, clearly and manifestly excluded. This case, therefore, must be regarded as though no notice of intention had been published in so far as the plaintiffs are concerned. If, therefore, the publishing of notice of intention is jurisdictional, the city council never obtained jurisdiction to levy the special tax upon the property of the plaintiffs, and hence the tax here in question is void. If the property of the plaintiffs could be legally assessed under the notice in question, we do not see why the board of equalization could not have recommended that any and all property "adjacent" to the im-



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provement should not also be assessed, and the city council could have done so by adopting an "amended ordinance." To so hold would practically do away with the publishing of a notice of intention as required by our statute.

We are clearly of the opinion that the judgment of the district court is right, and it accordingly is affirmed, with costs to the plaintiffs.

STRAUP, C. J., and McCARTY, J., concur.

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**BROPHY v. OGDEN RAPID TRANSIT COMPANY.**

No. 2728. Decided July 12, 1915. (151 Pac. 49.)

1. **PLEADING—RECoupMENT—ACTION FOR TORT—CLAIM OF GENERAL DAMAGES—SPECIAL DAMAGES.** Where the complaint, in an action against a street railroad for personal injury to plaintiff while a passenger, sought only general damages, and made no claim of special damages such as hospital expenses, etc., which defendant after the accident had provided and paid for, a plea in recoupment, setting up the hospital expenses, etc., as against the amount of recovery, was properly stricken, since the plaintiff had, in effect, approved such expenditure, and did not put defendant's liability therefor in issue. (Page 428.)
2. **APPEAL AND ERROR—HARMLESS ERROR—STRIKING PLEA IN RECONVENTION.** Such action, if irregular and erroneous, was not prejudicial to defendant, as it left it in the same condition as though the amount claimed by it had been allowed to plaintiff as special damages, and he had been deducted the amount thereof from his claim. (Page 429.)
3. **COSTS—APPEAL FOR DELAY—PENALTY.** In view of the absolute constitutional right of appeal and the statute allowing appellant to stay the judgment appealed from, defendant, whose notice of appeal from a judgment was duly served, and who executed a good and sufficient supersedeas bond securing the payment of the judgment if affirmed on appeal, would not be penalized on the ground that the appeal was taken merely for delay. (Page 429.)

•Appeal from District Court, Second District; Hon. J. A. Howell, Judge.

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Appeal from Second District.

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Action by Fred A. Brophy against the Ogden Rapid Transit Company, with a plea in recoupment or reconvention.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

*Boyd, De Vine & Eccles* for appellant.

*A. G. Horn* for respondent.

FRICK, J.

The plaintiff commenced this action against the defendant to recover damages for personal injuries sustained by him while a passenger on one of the cars of the defendant, who, it is alleged, owned and operated an electric street car line in Ogden City, Utah. The injuries sustained by the plaintiff, it appears, were severe and permanent. The defendant, immediately after the accident and injuries to the plaintiff, took him to a hospital, and there paid the expenses for nurse hire, hospital fees, and for medical attendance and treatment. The plaintiff, in his complaint, prayed judgment for general damages in the amount of \$30,000, and made no claim, and proved none, for special damages, such as hospital expenses, medical treatment, and medicines. The defendant, in its answer, admitted the accident, but denied that plaintiff had suffered damages in the amount or to the extent claimed by him, and also set up in its answer, by way of what is called a counter-claim, that it had expended for plaintiff's benefit, by reason of the injuries alleged in the complaint, for hospital expenses, nurse hire, and medical attendance, the sum of \$1,163, which sum, it claimed, is "an offset to any amount, if any, to which the plaintiff is entitled to recover in this action." The claim, therefore, was by way of what may be called a "recoupment," or "reconvention," rather than a counterclaim or counter demand. No affirmative judgment or relief was asked in the answer. When the case came on for trial plaintiff's counsel interposed an oral demurrer to defendant's claim as aforesaid, which the court sustained, and defendant's counsel ex-

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cepted to the court's ruling in that regard. The jury awarded plaintiff general damages in the sum of \$6,000, for which amount judgment was entered in his favor, and the defendant appeals.

The appeal is upon the judgment roll, without a bill of exceptions. Appellant's counsel, in their brief, state the question presented for decision thus:

"The only question here is whether or not the court erred in striking from the answer the allegations as to the expenditure of money on behalf of the plaintiff. That is, whether or not, when only general damages are asked 1 for, the defendant would be entitled to counterclaim expenditures on behalf of the plaintiff. Primarily the question is whether or not this is a proper item and condition for a counterclaim."

We do not deem it necessary to discuss the proposition of whether this claim is "a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or (is) connected with the subject of the action," which, under Comp. Laws 1907, Section 2969, would constitute a proper subject of counterclaim. We think that, in view of the pleadings, the legal question involved here is simple and easy of solution. The plaintiff, in his complaint, for the reason, no doubt, that defendant had paid (advanced) all expenses incident to his treatment and care in the hospital, all of which were made necessary by reason of the injuries he had received while a passenger on one of its cars, simply ignored his right to recover those expenses against the defendant. Stating it in another form, the plaintiff, in effect, simply credited the defendant with the amount it had necessarily expended for his benefit for the things enumerated and for which it was liable to him as special damages had he elected to sue for them. If he, however, had elected to sue for them, the defendant could have pleaded payment thereof to the persons entitled thereto, with plaintiff's knowledge and consent; and the answer, to that extent would have presented a good and proper defense. True, in this case, it was not expressed just in that form, but what was actually done really amounted to that. That is, plaintiff would primarily have been liable

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for the hospital fees and the doctor's expenses, and the defendant would have been liable to the plaintiff for all of such necessary and reasonable expenses as special damages. These demands both the plaintiff and the defendant recognized and acted upon, the plaintiff by limiting his claim to general damages approved and confirmed defendant's payments for the expenses aforesaid, and the hospital and the doctor to whom the fees and expenses were paid by the defendant by acceptance thereof clearly released plaintiff from paying them. The claims were thus adjusted in that way. Now, since the defendant was clearly liable for the expenses aforesaid to the plaintiff, it merely discharged that liability in making the payments in the manner it did. The plaintiff approved what defendant had done in that regard by not including those things in his suit against the defendant. Both the plaintiff and the defendant were thus made whole; the plaintiff by the method pursued has received payment for the special damages to which he would have been entitled as against the defendant, while the defendant has received full credit and allowance for every dollar it had expended for the benefit of plaintiff as alleged in its answer.

If it be conceded, therefore, that the proceedings were in fact irregular and erroneous, yet it must likewise be conceded that by the action of the trial court the defendant has suffered no legal or other wrong whatever. The defendant is left in precisely the same condition as though the 2 amount claimed by it had been allowed to the plaintiff as special damages and he had then deducted the amount from his claim because the defendant had already paid it for him to those who were entitled thereto. In no event, therefore, can the defendant successfully assail the judgment upon the ground we have quoted, which, as we have seen, is the only ground upon which it is assailed.

The respondent, however, with much vigor, insists that we should penalize the defendant because the appeal was taken for delay merely. A mere cursory examination of the record discloses that the appeal could not have 3 been taken for delay merely. The judgment was entered on the 8th day of October, 1914, the notice of appeal

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was served on the 10th and filed on the 11th of November following. It further appears that the judgment did not become final and appealable until the 26th day of October, 1914, on which day the motion for a new trial was overruled. The appeal was therefore taken within fifteen days after the judgment became appealable, or five and one-half months before the defendant, under the statute, was required to take an appeal. Moreover, the defendant executed a good and sufficient supersedeas bond, securing the payment of the judgment in case it should be affirmed by this court. The plaintiff is thus amply secured, and will receive the legal rate of interest, eight per cent., in addition to the principal sum for every day the judgment remains unpaid. Under our Constitution the right of appeal is absolute, and under the statute the appellant may or may not supersede (stay) the judgment appealed from. It would take a very strong case, therefore, to authorize this court to penalize the appellant for the mere reason that we can discover no prejudicial error in the record. Whatever conclusion may be reached in some particular case, there certainly is no good reason shown in this case why the appellant should be penalized because it has exercised its constitutional right of prosecuting an appeal.

For the reasons stated the judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

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Appeal from Third District.

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## SALT LAKE &amp; U. R. CO. v. BUTTERFIELD, et al.

No. 2717. Decided July 12, 1915. (150 Pac. p. 931.)

1. EMINENT DOMAIN—CONDEMNATION—DAMAGES. Notwithstanding Comp. Laws 1907, section 3598, declaring that from the damages for condemnation of property shall be deducted the benefits, general benefits for the establishment of a railroad cannot be deducted from the damages to owners whose land was taken for a right of way.<sup>1</sup> (Page 433.)
2. TRIAL—INSTRUCTIONS—REFUSAL. The refusal of requests covered by the charge given is not error. (Page 435.)
3. EVIDENCE—OPINION EVIDENCE—EXPERT TESTIMONY. Where a witness was qualified to give opinion evidence, the fact that his qualifications were shown in an informal manner will not render the admission of his testimony erroneous. (Page 435.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Condemnation by the Salt Lake & Utah Railroad Company against Almon T. Butterfield and another.

Judgment of condemnation and damages. Plaintiff appeals.

*Henry I. Moore and Evans, Evans & Folland*, for appellant.

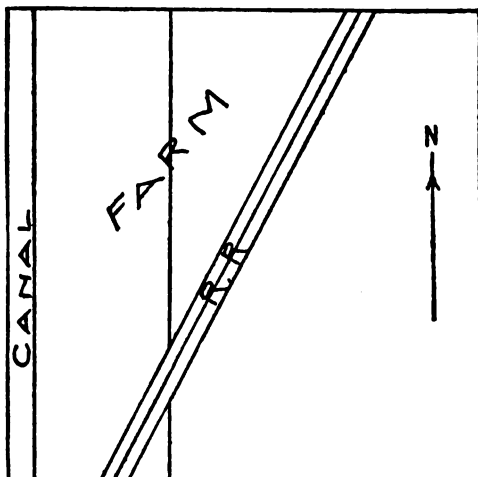
*Stewart, Stewart & Alexander*, for respondents.

FRICK, J.

The plaintiff commenced this proceeding in the district court of Salt Lake County to condemn a right of way over defendant's farm for railroad purposes. The evidence, in substance, shows that the defendant owns an irrigated farm of about ninety-two acres, and that the right of way in question runs through the same as indicated on the following plat:

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<sup>1</sup>*Railroad Company v. Fox*, 28 Utah, 811, 78 Pac. 800; *Hempstead v. Salt Lake City*, 32 Utah, 261, 90 Pac. 397; *Felt v. Salt Lake City*, 32 Utah, 275, 90 Pac. 402; *Kimball v. Salt Lake City*, 32 Utah, 253, 90 Pac. 395, 10 L. R. A. (N. S.) 483, 125 Am. St. Rep. 859.



The farm is irrigated from the canal so marked on the plat which runs west of the strip condemned, and which strip is fifty feet in width, marked "R. R." on the plat. It will be observed that the railroad runs somewhat diagonally through the farm, and the evidence is to the effect that in constructing and operating the road it will effect, and, to some extent at least, increase, the labor and expense of irrigating the land, in cultivating it, and in raising and harvesting the crops to be grown thereon. The farm was shown to be in a high state of cultivation and quite productive, and without the railroad upon it is easily cultivated and farmed. The jury found the value of the land actually taken to be \$400, the "damage to the remaining portion" of the farm to be \$1,000, and for "crops destroyed" \$50, or \$1,450 in all. The court entered judgment upon the verdict, and the plaintiff appeals to this court.

Appellant's counsel, in their brief, state the matter presented for review thus:

"The errors upon which the appellant relies for a reversal of the judgment consist of the giving of an erroneous instruction, the refusal to give appellant's requests, and the erroneous admission of testimony in the nature of opinion evidence, without having sufficiently qualified the witness."

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Appeal from Third District.

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The instruction excepted to and referred to above reads as follows:

"In determining the question as to whether any benefits have accrued to the remaining portion of the land by reason of the construction and operation of the railroad on the land taken, you should not take into consideration any 1 benefits shared by the defendants as owners of this land with the community in general, but only such benefits as are special to this particular property."

Counsel strenuously insist that the court erred in charging the jury that they should not offset general benefits against the damages, if any, they found the defendant would sustain to that portion of the land not taken or appropriated by the appellant. Counsel argue that, under our statute (Comp. Laws 1907, Sec. 3598), general benefits should be offset against what may be called special damages to the land not taken. They further insist that such is the law in many of the states of the Union. In support of their contention they cite the following cases: *Selma, etc., R. R. Co. v. Keith*, 53 Ga. 178; *Louisville & N. R. R. Co. v. Ingram* (Ky.), 14 S. W. 534; *New Orleans Pac. R. R. Co. v. Murrell*, 36 La. Ann. 344; *Travis County v. Trogon*, 88 Tex. 302, 31 S. W. 358; *Alabama & Florida R. R. Co. v. Burkett*, 46 Ala. 569. *San Francisco, etc., R. R. Co. v. Caldwell*, 31 Cal. 367; *Fulton v. Dover*, 8 Houst. (Del.) 78, 6 Atl. 633, 12 Atl. 394, 31 Atl. 974; *People v. Williams*, 51 Ill. 63; *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371; *Nette v. New York L. El. R. R. Co.*, 1 Misc. Rep. 342, 20 N. Y. Supp. 627; *Putnam v. Douglass County*, 6 Or. 328, 25 Am. Rep. 527; *White v. Charlotte R. R. Co.*, 6 Rich. (S. C.) 47; *Kennedy v. Indianapolis*, 103 U. S. 599, 26 L. Ed. 550.

We cannot agree with counsel that section 3598, *supra*, should receive, or that it even admits of the construction contended for by them. Indeed, this court has given that section practically the effect which the trial court apparently gave it in the instruction excepted to. *Railroad Co. v. Fox*, 28 Utah, 311, 78 Pac. 800, where the section is quoted and applied. The same rule was again followed in *Hempstead v. Salt Lake City*, 32 Utah, 261, 90 Pac. 397; *Felt v. Salt Lake City*, 32 Utah,



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275, 90 Pac. 402; *Kimball v. Salt Lake City*, 32 Utah, 253, 90 Pac. 395, 10 L. R. A. (N. S.) 483, 125 Am. St. Rep. 859.

Referring, now, to the California case cited by counsel. It is true that in *San Francisco, etc., R. R. Co. v. Caldwell*, *supra*, the rule contended for by counsel is apparently sustained. We say "apparently" for the reason that the court in that case followed a special statute. In a much later case, namely, in *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188, the rule adopted by this court is the one that is enforced in the latter case. In that case the court, in referring to the question now under consideration, says:

"General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement. *Lewis on Eminent Domain*, Sec. 471. They are conjectural and incapable of estimation. They may never be realized, and in such case the property owner has not been compensated save by the sanguine promise of the promoter."

The court then defines special as contradistinguished from general benefits and says that general benefits, as a rule, are based upon what the court calls the chance of increase in value by increased population and by increased facilities of transportation, etc. The court then proceeds:

"This chance for gain is the property of the landowner. If a part of his property is taken for the construction of the railway, he stands in reference to the other property not taken like similar property owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement of value in order to secure the increased facilities which the railroad will afford. If he is compelled to contribute all that he could possibly gain by the improvement, while others in all respects similarly affected by it are not required to do so, he does not receive the equal protection of the law."

The same view is expressed by the author in 2 *Lewis, Eminent Domain* (3d Ed.) pp. 1198, 1199, where the cases in support of the foregoing text are collated by the author. In view of the foregoing, and in view of what we said in *Railroad v. Fox* and in *Hempstead v. Salt Lake City*, *supra*, we do not deem it necessary to review the other cases cited by counsel, nor to discuss the subject further, except to say that in our

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judgment the rule adopted by the trial court is the proper one, and is, as we think, sustained by the great weight of authority.

The assignments relating to the refusal to charge as requested must also fail for the reason that some of the requests refused merely stated the measure of damages as contended for by counsel, and which we have just discussed, while the subject-matter of the other requests was sufficiently covered by the court's general charge. At all events, it is apparent from the record that the refusal to charge as requested in no way prejudiced appellant in any of its substantial rights. 2

Finally, the contention that the court erred in permitting a witness to testify upon subjects concerning which he was not qualified to testify can, in our opinion, not be sustained. While the qualifications of the witness in question should, perhaps, have been shown in a more formal manner, yet, from the whole of his testimony, it is clear that he possessed the requisite knowledge and experience under the law to authorize the court to receive his testimony. That being so, the weight to be given to that testimony was for the jury. 3

Upon a careful examination of the whole record we can discover no prejudicial error. The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

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D. H. Perry Estate v. Ford, 46 Utah 436.

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## D. H. PERRY ESTATE v. FORD.

No. 2703. Decided July 15, 1915. (151 Pac. 59.)

1. **BOUNDARIES—AGREED BOUNDARIES—WHAT CONSTITUTES.** In a suit to restrain trespass on land, evidence held insufficient to show that plaintiff was entitled to the property in controversy by reason of a boundary line by acquiescence.<sup>1</sup> (Page 452.)
2. **ADVERSE POSSESSION—ADVERSE HOLDING—WHAT CONSTITUTES.** Possession of land only by leaving vehicles there and occasionally depositing refuse is not such possession as will ripen into title. (Page 452.)
3. **APPEAL AND ERROR—DETERMINATION—REVERSAL.** Where the evidence in support of plaintiff's pleaded title was insufficient to support judgment in its favor, and there were no findings on defendant's claim of adverse possession, which was not established by the evidence, judgment for plaintiff should be reversed, the cause remanded, and the parties given leave to amend. (Page 452.)

McCarty, J., dissenting in part.

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by the D. H. Perry Estate against Rufus Ford.

Judgment for plaintiff. Defendant appeals.

REVERSED and remanded.

*T. D. Johnson* and *Wade M. Johnson*, for appellant.*C. C. Richards* and *John G. Willis*, for respondent.

FRICK, J.

The plaintiff, a corporation, in July, 1913, commenced this action against the defendant to restrain him from trespassing upon a certain strip of ground claimed by it as owner, and,

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<sup>1</sup>*Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009; *Binford v. Eccles*, 41 Utah, 453, 126 Pac. 333; *Tanner v. Stratton*, 44 Utah, 253, 139 Pac. 940.

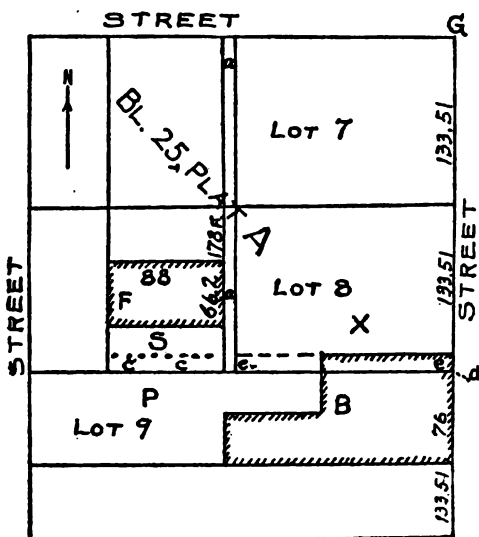
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in addition to the injunction prayed for, also asked for general relief.

In the complaint plaintiff's land is described as follows:

"Beginning at the northeast corner of lot No. 9 in block 25, plat A, Ogden City survey; thence south 76 feet; thence west 301.65 feet; thence north 76 feet; thence east to the place of beginning. Together with a strip of land on the north side of said lot bounded and described as follows: Beginning at said northeast corner of said lot No. 9 in said block 25, plat A, thence west 301.65 feet; thence north 2.6 feet; thence east 301.65 feet; thence south to the place of beginning."

The only portion of the land just described that is in question in this action is a small strip 88 feet in length by 2.6 feet in width, and is indicated on the following plat by "c c":



The plaintiff claimed ownership of the strip by reason of an agreed or implied boundary line, and also as surplus ground. The defendant denied plaintiff's ownership and possession and right of possession, and claimed title to the strip both by conveyance and by adverse possession under our statute.

The land described by the defendant as owned by him is as follows:

“Beginning at a point 10 rods and 6 feet west and 198 feet south from the northeast corner of lot 7 in block 25, plat A, Ogden City survey, according to the monuments of Ogden City as now established, and running thence west 88 feet; thence south 68.6 feet; thence east 88 feet; thence north 68.6 feet to the place of beginning.”

The court found the issues in favor of the plaintiff; that is, the court found that plaintiff was the owner of the strip in dispute both by reason that it was surplus ground and because of an agreed or implied and established boundary line. The court did not directly find upon the defendant's claim of adverse possession. Upon the findings the court made conclusions of law, and entered a decree in which it was “ordered, adjudged, and decreed” that the plaintiff “do have and recover from \* \* \* the defendant the possession” of the strip of land which we have marked “c c” on the plat, and further perpetually enjoined defendant from in any way interfering with plaintiff's possession and enjoyment of said strip of ground or any part thereof.

The defendant appeals, and assails the findings and judgment as being contrary to the weight of, if not entirely unsupported by, the evidence.

Plaintiff's counsel contend that the assignments are not sufficiently specific to authorize us to review them. We think otherwise. The assignments point out as well as that may be done within the limits of a general assignment in what particulars the defendant claims the evidence to be insufficient to sustain the findings, and also point out in what other respects it is claimed the court erred in making findings or in omitting to do so. Plaintiff's counsel, with considerable vigor, further contend that this action comes within the rule of the so-called boundary line cases decided by this court, namely, *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009; *Binford v. Eccles*, 41 Utah, 453, 126 Pac. 333, and cases there cited; and *Tanner v. Stratton*, 44 Utah, 253, 139 Pac. 940. *Holmes v. Judge* seems to have been the first of that class of cases, and *Tanner v. Stratton* is the last one. It is insisted that the facts bring

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this case within the rule laid down in *Binford v. Eccles, supra*. We cannot yield assent to the contention. Nor do the facts bring it within any of the so-called boundary line cases. In our judgment, there is a very wide distinction between what controlled in *Binford v. Eccles* and other like cases and the case at bar. In all of those cases the evidence was reasonably clear and convincing that the parties in interest had intended the fences or other structures in question there as being placed upon the boundary line, and that the parties mutually recognized, or at least for so long a term of years acquiesced in treating, such fences and structures as marking the boundary line of the adjoining lands or lots there in question as to authorize a finding that the boundary lines were established by agreement either express or implied. The case of *Binford v. Eccles* is an example upon that point. In that case we think the facts clearly establish what we have just said. We quote only a portion of the facts which controlled in that case as found on page 456 of 41 Utah, on page 334 or 126 Pac.:

"The evidence is undisputed that the ground claimed by both parties to this action at one time was owned by one and the same owner; that approximately twenty-five years before the appellant became the owner of the land now claimed by him the prior owner sold a parcel of ground off the east side of his ground to one of appellant's predecessors in title, and after having sold and conveyed the same the predecessor aforesaid desired an additional three-foot strip along the west side of the parcel before purchased by him, which the owner sold and conveyed to him; that after such conveyances the purchaser of said strip erected a substantial fence along the west boundary line of said strip; that said fence from thenceforward for approximately twenty-five years before appellant became the owner of the parcel of land purchased as aforesaid from the original owner was always recognized and maintained as the boundary line between the parcels of land, one of which is claimed by respondent, and the other by appellant; that during the time aforesaid said fence at times required repairing and replacing, which was always done when necessary by the owners of the parcels of land lying on either side of the strip by each owner contributing his proportion of the cost of repairs or maintenance."

The only fact that is common to both *Binford v. Eccles* and this case is that there is a surplus in the block, which to some extent increased the size of the lots.

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Let us examine a few of the controlling facts of this case. By referring to the plat and the record title we find that the predecessor of plaintiff obtained title to the following parcel of ground, namely: Beginning at the northeast corner of lot 9, which is the point marked "d" on the plat; thence south 76 feet; thence west 330 feet; thence north 76 feet; thence east 330 feet to the place of beginning. The plaintiff claims by precisely the same description. The parcel is marked P on the plat. This is the description given both in the deed and in the decree of distribution. It will be noticed that in the plat the length is given as 301.65 feet. The difference arises for the reason that on the west end of lot 9 a strip approximately thirty feet in width was taken off for a street. This, it seems, was done after plaintiff became the owner. That, however, is not material. Plaintiff therefore owns a parcel of land in lot 9, according to the record title, which is 76x301.65 feet. Now, in addition to this, the Probate Court distributed to the plaintiff a strip of ground described in the decree as follows:

"Also a part of lot 8 in block 25, plat A, of Ogden City survey, Weber county, Utah, commencing at the southeast corner of said lot 8; running thence west 10 rods; thence north  $2\frac{1}{2}$  feet; thence east 10 rods; thence south  $2\frac{1}{2}$  feet to the place of beginning."

This description thus again begins at the point marked "d" on the plat, and describes the strip which is marked "10R," "e e" on the plat. The source of title to this strip is not shown. Whether it was acquired by conveyance, adverse possession, or otherwise is not made to appear. The only real importance to these descriptions in this case is that, while the deed describing the parcel of 76x330 feet was obtained in 1870, and the decree of distribution was made in 1903, yet both the deed and the decree of distribution recognized the north line of lot 9 and the south line of lot 8 as being coterminous and that the starting point of the two descriptions is identical. From this it is also clear that plaintiff has always claimed the full 76 feet, that being the quantity described in the deed of 1870, in lot 9, and now not only claims the strip marked "e e" as described in the decree

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of distribution as being 10 rods by  $2\frac{1}{2}$  feet, but claims a strip 301.65 feet in length by 2.6 feet in width. It was made to appear that a building was erected on the parcel of ground marked X on the plat, but whether that building was erected to conform to the building marked B on the plat, or whether the latter was erected to conform to the former, is not made clear. The building marked B was erected in 1881, and from the evidence it seems quite probable that at that time there was a building of some kind used for business purposes on the parcel marked X. But, be that as it may, we are not, nor was the defendant, concerned with the buildings that were constructed or the improvements that were made on premises to which he and his predecessors in interest were all strangers, and where neither had any right to speak or interfere in case anything was done with those premises.

We shall now consider the grounds upon which plaintiff bases its claims to the strip in controversy. The defendant deraigned title from one Lorin Farr. Farr, it seems, owned the strip of ground, with other ground, west of the alley marked "a a" on the plat. The ground owned by Farr extended south across lots 7 and 8 to the supposed north boundary line of lot 9. About the year 1880, or perhaps a year later, the sons of Lorin Farr, who were business partners, leased the strip of ground from their father, and at that time erected the shed, marked S on the plat. This shed was about 25 feet north and south by approximately 84 feet east and west, and was erected to store machinery and farm implements. The rear or south end, marked by the dotted line on the plat, was constructed about 6 feet high by setting cedar posts into the ground. The front part of the shed was about 10 feet high, and the whole was boarded up, including the south end, with boards with the roof slanting to the south, the rafters of which, the testimony showed, extended beyond the south wall from "6 inches to 3 feet." One of the Farris who helped to construct the shed, after fully describing its purpose and construction, testified as follows:

"Q. Did you and your firm (Farr Bros.) in constructing this shed construct it with respect to where the line might be, or did you know where the line was? A. Why, we put the



shed up there. We drew a line, and thought that that would be on our ground. We were not particular as to the line, because it was only a temporary shed. We just put it there for the time being. Q. And for your own convenience? A. For our own convenience. Q. And your father had nothing to do with it? A. No."

The witness also testified that he and his brothers obtained consent from their father to erect the shed; "that he (the father) knew that it was constructed, whether he knew they were right on the property or not." There was also some evidence that at one time there were wires fastened to the posts along the south end of the shed. The only inference, however, that the south end of the shed was intended as a fence was the fact that it was constructed with cedar fence posts, and that at one time, as the witness said, he saw some wires strung along those posts. The witness, however, admitted that even then the posts constituted a part of the shed, and that the same was being used for storage purposes. A careful reading of all of the evidence, which we cannot pause here to be set forth in detail, convinces us that neither the posts nor the shed were placed for the purpose of marking a boundary line; nor were they maintained or recognized for that purpose. Farr's testimony regarding the purpose for which the shed was erected, and how it came to be placed where it was, stands undisputed. Indeed, there is no evidence which, under the circumstances of this case, would warrant a finding that the shed was ever intended as marking the boundary line between lots 8 and 9, or any part of that line. True it is that a witness who was a joint owner of the property for about five years prior to 1899, when defendant purchased it, testified that he made no claim to any part of the property lying south of the shed. This witness was, however, very frank in stating that he did not know where the boundary line was, but assumed the south end of the shed to be the south end of their property. The evidence also without conflict showed that a portion of plaintiff's parcel, as well as the remainder of lot 9 lying immediately south and in the rear of the shed, was open ground not used by any particular person or persons, but was at times used by farmers to

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hitch and feed their teams on. To hold that under such circumstances the shed in question constituted an agreed or implied boundary line would, in our judgment, constitute a very dangerous precedent, and, instead of lessening and settling disputes and preventing unnecessary litigation, which is one of the prime elements in all boundary line cases, it would result in creating and multiplying them. Fences, when constructed along the outer boundaries of lands or lots, usually are intended to mark the boundary lines of coterminous owners, and, in the absence of strong countervailing proof, may be regarded as having been placed upon the ground for that purpose; and, when such fences are acquiesced in and recognized as marking the boundary for a long term of years, an agreed boundary may well be implied. But sheds, out-houses, and other like structures, and especially temporary ones, placed on land, and more particularly so when placed by tenants, as every one knows, are not intended to mark boundary lines; and, while they may be placed on the line, their purpose, ordinarily at least, is not to indicate the boundary. To hold otherwise is diametrically opposed to the common knowledge and experience of all men. While we do not wish to be understood as holding that even temporary structures may not be placed so as to make a boundary line, yet, where such is claimed to be the case by an adjoining owner, the evidence should be clear and convincing that such a structure was erected to mark the boundary. Courts should be slow, therefore, to adopt a rule the enforcement of which might result in almost incalculable mischief.

There is, however, another phase of the case which plaintiff's counsel contend has a controlling influence upon the decision. The evidence without dispute shows that the official call in defendant's deed is the northeast corner of lot 7 at the point marked "G" on the plat. Defendant's description thus starts 10 rods and 6 feet west (a point about the center of the alley "a a") and 198 feet south from the point "G," running thence west 88 feet; thence south 66 feet; thence east 88 feet; thence north 66 feet to the place of beginning. The land just described is marked F on the plat. The beginning of this parcel is therefore 198 feet south from the north line

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of lot 7, and when the 198 feet are added to the 66 feet, the width of the parcel, it evidently was thought that it would bring the south line of the parcel which was intended to be conveyed to the defendant to the south line of lot 8, which is indicated by the black line between lots 8 and 9 on the plat. That such would be the result was evidently assumed by the parties in interest, for the reason that it was further assumed that block 25 was a square of 660x660 feet, and hence each one of the five lots into which each half block was divided would have a frontage of precisely 132 feet. The distance across lots 7 and 8, it was thus assumed, would be 264 feet; that is, 198 plus 66 feet, which would be 264 feet, the distance given. It, however, developed that block 25 had a surplus of over 7 feet, and thus each lot was given a frontage of approximately 133.5 feet. The foregoing distances are taken from the plaintiff's map, although there it was made to appear the distance was not quite 133.5 feet, but we have stated it in round numbers to be that. Now, the fact that defendant's deed only called for 66 feet north and south, and because of the existing surplus to which the several lots were entitled, constitutes another ground upon which plaintiff bases its claim to the strip in question. We have already seen that plaintiff's claim to the strip upon the ground of an agreed or implied boundary line cannot prevail, and therefore the question arises whether its claim to the strip upon the ground of surplus land can be sustained. We are clearly of the opinion that this claim must likewise fail. The plaintiff, so far as its claim is concerned, has permanently fixed the boundary line between lots 8 and 9, as indicated by the black line in the plat indicating the boundary line between those two lots. It claims 76 feet, no more, no less, south of the north boundary line of lot 9. It therefore claims all its deed calls for as lying within the boundaries of said lot. In addition to what its deed calls for, however, it claims 2.6 feet in lot 8. Now, the surplus of lot 9, assuming the 76 feet owned by plaintiff is entitled to all of the surplus, according to its own evidence, amounts to only a little less than 1.5 feet. If this surplus, therefore, were claimed as a part of the surplus of lot 9, which it is not, the claim could only extend to 1.5 feet. But 76

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feet out of 132 feet is less than three-fifths of the whole, and hence plaintiff would, at most, be entitled to three-fifths of 1.5 feet, which would be less than one foot. But even this is upon the assumption that plaintiff can claim a surplus in lot 8. It would seem that, inasmuch as its entire 76 feet is in lot 9, it cannot claim any surplus in lot 8, whatever that surplus may be. The rule respecting surplus ground evolved by the courts is to the effect that in case a block is divided into lots, each one of which is stated to have a given number of feet, and it develops that the block contains more feet than is contained in all the lots when added together, then in such case the excess or surplus ground is divided or apportioned among all of the lots in proportion to the dimensions of each. *Pereles v. Magoon*, 78 Wis. 27, 46 Pac. 1047, 23 Am. St. Rep. 389; *Welder v. Carroll*, 29 Tex. 317-335; *McAlpine v. Reichenecker*, 27 Kan. 257-264. As indicated on the plat, the surplus of lot 9 must therefore all be south and none to the north of the boundary line between lots 8 and 9. Whether a purchaser of a specific number of feet of an original lot may claim his proportion of the surplus we leave undetermined. If, however, such a purchaser may claim his proportion of the surplus, then, under the facts and circumstances of this case, it is the defendant, and not the plaintiff, who is entitled to at least a portion of the surplus allotted to lot 8, a portion of which defendant purchased. Plaintiff's claim to the strip upon the ground of surplus is no stronger, therefore, than its claim of an agreed or implied boundary line. So far as we can discover, plaintiff's claim to the strip is, to a large extent at least, grounded upon the fact that, because it has succeeded in maintaining its claim to the strip lying north of the boundary line of lot 9 and east of the alley marked "a a" on the plat, therefore it should also succeed in maintaining it to the portion of the strip lying west of the alley. It must be manifest to all, however, that the circumstances, conditions, and ownership forbid that the same rule which may have obtained east of the alley can control west of it. If from all the facts and circumstances it be assumed, therefore, that the defendant has no record title to the strip in question, yet it is very clear that the plaintiff has none, and for the reasons already made

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to appear the defendant's claim to the strip in any event is superior to the plaintiff's claim.

We think, furthermore, that, at least as against the claims of the plaintiff, the defendant has established his claim to the strip in question by adverse possession under our statute. Upon that phase of the case the evidence is undisputed that the defendant purchased the property in 1899; that he went into possession of it at that time and immediately had a survey made, and his south line was then located along the south boundary line of lot 8 as indicated on the plat; that he cut a door through the south end of the shed, and during all of the time from 1900 to 1914, inclusive, had used the shed as a stable for his horses, taking them through the door; that the parcel of land from 1900 to 1914, when the case was tried, had been assessed as a parcel of ground 84x68.2 feet. Apparently the reason why the length of the parcel was fixed at 84 rather than 88 feet was because a portion of it was in the alley marked "a a." In the assessment rolls, as appears from the bill of exceptions, this parcel of land during all of the years aforesaid was described as "beginning 77 feet west from the southeast corner of lot 8, block 25," thence "west 84 feet, north 68.2 feet, east 84 feet, south 68.2 feet to beginning." In the tax receipts the description was less specific. The defendant proved that from 1900 to 1913, inclusive, he had paid all taxes assessed against said parcel; that during all of those years he had no other land in the block; and that he had always claimed the whole of it as his own. Some contention was made at the trial, and the trial court seemed somewhat in doubt respecting the sufficiency of the description of this parcel in the tax rolls and receipts. Assuming, without deciding, that upon an attack by one who had paid the taxes, and who claimed the land under a tax title, the description was vague and uncertain, yet, in view of defendant's continuous possession, and for the purpose of warding off an attack by one who had no semblance of title, the description in both the tax rolls and in the tax receipts, in our judgment, was sufficient. If it were assumed, therefore, that, as against one who held the legal record title defendant's claim of adverse possession, for the reasons mentioned by the trial court,

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were not absolutely conclusive, yet, as against a claimant with no better rights than the plaintiff had, defendant's claim of adverse possession should prevail. The trial court therefore also erred in not finding for the defendant upon this ground.

Since writing the foregoing my Associate Mr. Justice McCarty has handed me his dissenting opinion. In view that he has apparently misconceived the theory upon which the case was originally commenced and tried, and upon which I have attempted to dispose of this appeal, it becomes necessary for me to more fully call attention to some of what I consider the controlling features of the case, all of which constitute a part of the record. I have deemed it fairer to my Associate to add what I have to say to my former opinion in this form, rather than to rewrite that opinion, since the dissenting opinion perhaps is, at all events may be, largely based upon what I said therein.

In my judgment, my Associate has entirely overlooked the groundwork of plaintiff's claim as the same is reflected from the allegations of its complaint and the evidence adduced in support thereof. In order to avoid a misconception of the precise claim of the plaintiff, I, in my opinion, gave the description of the property claimed by the plaintiff in the precise words that the same is stated in its complaint. In that description the plaintiff claims 76 feet in lot 9 and 2.6 feet in lot 8 of block 25. Its proof showed that it had obtained a deed "beginning at the northeast corner of said lot 9; thence 76 feet south; thence west," etc., to the place of beginning. The proof further showed that on the 23d day of September, 1903, the District Court of Weber County, sitting as a Probate Court under our statute, duly distributed to the plaintiff a strip of ground 2.5 feet wide by 10 rods in length, running east and west, which strip constitutes all that portion of the 2.6-foot strip described in the complaint which lies east of the alley adjoining defendant's property on the east. The strip is marked "e e" on the above plat. The plaintiff thus not only alleged, but proved, that the strip in question was wholly north of the north boundary line of lot 8, and not, as is now contended by my Associate, that said strip formed a part of lot 9. Moreover, the plaintiff introduced two maps

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or plats on which the boundary lines of lots 8 and 9 are precisely as I have indicated them on the plat appended to my opinion and to which I again refer. Indeed, that plat, with the exception of immaterial details, is a miniature of a map on which are given the official surveys which both parties conceded at the hearing correctly designated the lot line between lots 8 and 9. Neither party contended at the trial, and neither of them asserts in this court, that plaintiff's land was all in lot 9, nor that the north boundary line of said lot extended north to the south end of the shed which is indicated by the dotted line on the plat, but they both insisted that at least 2.6 feet of what plaintiff claimed was north of lot 9 and in lot 8. The most that was claimed by the plaintiff in that regard was that the defendant and his predecessors in interest in erecting the shed had established the south boundary line of defendant's ground, and, hence, under our former decisions, he was estopped from disputing the boundary as established by the south side of said shed. That was plaintiff's contention in the court below, and it is its contention in this court, except that it claims, in addition, that it is entitled to its share of the surplus ground in block 25, as I have pointed out in the opinion. How is all this met in the dissenting opinion? It is met by having recourse to the abstract of title which was made by some one in 1899, and which for the purpose of showing how defendant deraigned title, was introduced in evidence by him, but was not offered for the purpose of showing the boundary lines between any of the lots. Indeed, neither of the parties claimed or claims any such purpose for the abstract. In making that abstract the abstractor, or some one else, it is immaterial who, for his own purpose or otherwise, made a pencil sketch of the whole of block 25, including therein all of lot lines from lot 1 to 10 as the abstractor thought they were or as he assumed them to be. Now, my Associate adopts that sketch as his plat, and argues therefrom that the north boundary line of lot 9 always was, and now is, 2.6 feet north of where both the plaintiff and defendant in their pleadings, by their evidence, in the court below claimed, and in this court claim, it to be. In order not to bind the plaintiff by the official map which I have repro-

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duced in the plat, or for some other reason, my Associate says it was introduced by the defendant. In this he is mistaken. The reporter's indorsement and signature on the back of the map in question show that it was introduced in evidence as "Pltffs. Exhibit B on Cross-Exam.," and there is no indorsement on the exhibit that it was offered or introduced by the defendant. It is true, however, that the defendant, both at the hearing, and, it seems, at the trial, approved and adopted the map; but the plaintiff did so likewise, and, in addition, produced an enlarged map on which the lot lines are given precisely as they are given upon what my Associate designates as defendant's map of plat. The only difference between the two maps is that in the enlarged one the frontage of lots 7, 8, and 9 is given as 333.474 each, while in the other one it is given in round numbers as 333.5, but in which map the north boundary line of lot 9 is given as 2.6 feet south of the south side of defendant's shed. I assert that it is beyond any possibility of dispute that both parties claimed that the plaintiff owned 76x301.65 feet in lot 9, and that it also claimed that it owned 2.6x301.65 feet in lot 8, which claim the defendant disputed to the extent that it only owned that portion of said 2.6-foot strip in lot 8 which lies east of the alley adjoining defendant's property on the east, and that the plaintiff had no right in or title to the remainder of said strip. The plaintiff relied upon a decree of court for title to the 2.6-foot strip lying east of the alley, and introduced the same in evidence. My Associate, however, refuses to recognize that decree seriously as evidence of title, and insists "that the decree of distribution of the land in dispute was had merely as a matter of precaution," etc. While the statement affords an easy method of establishing the claim that the abstractor's pencil sketch correctly marks the boundary line between lots 8 and 9, it nevertheless leaves the plaintiff in a dilemma. As before pointed out, plaintiff's description commenced at the northeast corner of lot 9, and runs thence south 76 feet no more, no less. If, therefore, the north boundary line of lot 9 is forced north so as to include the 2.6-foot strip covered by the decree of distribution, the 76 feet to which the plaintiff is entitled in lot 9 falls short of covering all that it



claims to the south of the north line of lot 9. Counsel for plaintiff appreciated this fact when they laid claim to the frontage of 76 feet, plus 2.6 feet. They saw that plaintiff under its deed could only claim title to 76 feet in lot 9, and therefore must claim the remaining 2.6 feet in lot 8, just as the District Court adjudged in the decree of distribution. Counsel were required to protect a frontage of 76 plus 2.6 feet, and by following the abstractor's sketch they would fall short just the 2.6 feet covered by the decree. While forcing the north boundary line of lot 9 north may thus be useful in vindicating or settling one aspect of the case, it utterly fails to square with the real contentions of the parties or with the actual situation as it appears upon the ground. In view of what I have already said, I need not pause to show that the decree in fact covered no part of the land "in dispute."

Then, again, my Associate seeks to dispose of the question of surplus ground by contending that the parties are bound by established lines, regardless of whether there is any surplus or not, etc. That, under certain circumstances, no doubt is the law, but parties have the right to consider the surplus if they so desire, and when that is done by mutual consent, as is the case here, courts have no right to ignore the agreements or concessions of the parties in that regard. It may well be that the surplus in lots 8 and 9 is adjusted to the satisfaction of all of the interested parties, but if it is not satisfactory to all the question should not be attempted to be settled by this court until some one in interest complains. The plaintiff evidently is satisfied to have the north boundary line of lot 9 and the south boundary line of lot 8 remain just where it is shown to be upon its map and on the plat appended to this opinion, and so, apparently, is the defendant. Those two are the only parties before us, and we have no right to disturb that line for the mere purpose of arriving at a result which would be more satisfactory to us, and thus, to say the least, create uncertainty and possibly turmoil among coterminous owners. In this case, therefore, the plaintiff asserted ownership of land lying in both lots 8 and 9, and the defendant acquiesced in that asser-

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tion in so far as the 2.6 feet by 10 rods is concerned, but no farther, and I think that this court is also required to acquiesce. The plaintiff, therefore, contends: (1) That the defendant had established the south boundary line of his property, and thus was bound thereby; and (2) that, if the first claim was not established, it nevertheless was the owner of the land up to the south side of defendant's shed by reason of the surplus ground in block 25. As I view it, while the plaintiff had at least some ground upon which to base its claim that the defendant and his predecessors in title had established the south boundary line of his land at the south end of his shed, yet it had nothing whatever upon which to base its claim that it was entitled to the strip as surplus ground. Nor is there anything in the pleadings or in the evidence upon which a claim can reasonably be made that the north boundary line of lot 9 is north of the distributed strip of ground. As I said in my opinion, while the evidence upon the question of adverse possession is not strong, yet, so far as the payment of taxes is concerned, it is complete, and therefore strong enough to ward off the aggressions of the plaintiff, which, under the evidence, has shown no right to the disputed strip whatever.

Since writing the foregoing, Mr. Chief Justice STRAUP has written a concurring opinion in which, while concurring with the writer in the main propositions, he nevertheless thinks the case should be remanded for a new trial for the reasons by him stated. While I am still of the opinion that as against the claims of the plaintiff the defendant should prevail, yet, in deference to the opinion of the Chief Justice, I feel constrained to yield that point. I yield, however, only for the reasons stated by Mr. Chief Justice STRAUP, and not for the reasons now suggested by Mr. Justice McCARTY that there may be a variance between the proof and the allegations of the complaint respecting the description of the property. The proof could not have more strictly followed the allegations of the complaint than it does in this case so far as the description of the property is concerned. I yield because there is a variance among the members of this court, and not because of any other variance.

The judgment is therefore reversed, and the cause is remanded to the District Court of Weber County, with directions to grant a new trial and to permit either party to amend his pleadings, if so advised; appellant to recover costs.

STRAUP, C. J.

The plaintiff alleged the ground owned by it (76x301.65 feet) to be in lot 9, and the disputed strip (2.6 feet) to be in lot 8, adjoining it on the north. It alleged title to the strip on the theory of an agreed boundary line by acquiescence—that is, that the north line of the disputed strip for many years had, by the parties and their predecessors, been recognized and acquiesced in as the boundary line between their respective parcels, the plaintiff's to the south, and the defendant's to the north of that line. On that theory the court made findings and rendered a judgment in favor of the plaintiff awarding to it the strip in dispute. I concur with Mr. Justice FRICK that the findings in such respect are not supported by the evidence, and that the judgment, on this record, cannot be upheld on any such theory. To grant the plaintiff the ground on any other theory is to depart from the pleadings and to render a judgment without a pleading to support it. I thus concur in the reversal of the judgment. 1

I am, however, not satisfied that we, on the record, should direct a judgment for the defendant. He predicated his right and title to the disputed strip on an adverse holding. As stated by Mr. Justice FRICK, the trial court made no findings as to that issue. We thus do not know what view the trial court took of that, except as may be implied from the findings and judgment which were made and rendered, that it, without specific findings, held against the defendant on the issue of an adverse holding. We, no doubt on a review of the record, and with respect to such or any, issue, may ourselves make or direct findings, or remand the case for further proceedings. As stated by Mr. Justice FRICK, the evidence to support the defendant's title by an adverse holding is not strong. I think it weak and insufficient for this: The defendant's possession and occupancy or use of 2, 3

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the strip was not of such a character as was calculated to give the owner, or the world, notice of an adverse holding, and to enable the plaintiff, against whom it is claimed to have been exercised, to know about it, and to resist the acquisition of the right before the period of limitation had run. The strip in dispute was not inclosed nor cultivated nor improved by the defendant. His possession and occupancy consisted principally in this: (He cut a doorway in the south side of the shed which abutted the disputed strip on the north, and through which he took horses in and out of the shed, and threw manure from the shed, and left wagons stand partly on the strip and partly on uninclosed and unoccupied lands to the south of the strip) In such manner the defendant used not only the disputed strip, but also, and of necessity, so used additional, open, uninclosed, and unoccupied ground to the south of the strip, which additional ground confessedly belonged to the plaintiff, and admittedly was not acquired adversely or otherwise by the defendant. It is not uncommon for one neighbor to let vehicles stand on uninclosed and unoccupied ground of another, to lead or drive horses over it, and to throw manure and rubbish on it. All that may be a trespass or a nuisance; but it hardly is such a possession or occupancy as is calculated to give the owner notice of an adverse holding, and knowledge to him that, if he does not take steps to interrupt the occupancy, it will ripen into a title by limitation. The chief ground on which a disseisor acquires title by adverse possession is laches of the owner, his seeing his boundary and land invaded by an adverse claimant asserting title, and himself remaining passive and acquiescing in such adverse claim and assertion. Hence the general rule that the possession of an adverse claimant must be continuous, exclusive, open, hostile, notorious, and of such character as to enable the owner to know of the invasion of his rights. I do not think the defendant's possession or occupancy or use of the strip was of that character. Thus, on the evidence, the relevant evidence pertinent to the issues as presented by the pleadings—by the plaintiff an agreed boundary line by acquiescence, by the defendant an adverse holding—I think neither, as against the other, has shown enough to prevail. That the strip belongs

either to the plaintiff or to the defendant is clear enough. It does not belong to another. To hold that the plaintiff has not shown title, the only title alleged by it, is one thing; to hold that the defendant has title by an adverse holding is quite another and different thing. When a grant is decreed to one on an adverse holding, such award is made regardless of whether his adversary's title otherwise was perfect or imperfect, strong or weak; for an adverse holding, when established, operates as a bar, and conclusively presumes a grant from the rightful owner. True, the plaintiff, on the record, has not shown title as alleged by it. Neither, in my judgment, did the defendant. The case is one where both parties fail for want of proof. The judgment thus might be cast against him having the burden, and neither party could complain were that done. But, on the record, I am not satisfied that the question of whether the plaintiff or the defendant is entitled to the disputed ground is dependent upon the issues alone as presented, and not upon other issues, including that with respect to the location of the boundary line between lots 8 and 9. If both issues, as presented, fail, then, in determining whether the disputed ground belongs to the plaintiff or to the defendant, the location of the boundary line between lots 8 and 9, considered in connection with the surplus ground in the block, is important, as well as whatever other source of title or right of possession either party may be able to bring forward.

I therefore think the judgment should be reversed, the case remanded and thrown at large, and either party given leave to amend if either be so advised.

MCCARTY, J. (dissenting in part).

In his answer defendant alleges that he has acquired title to the ground in dispute by adverse possession, and it is the only source of title pleaded by him. I shall assume, however, for the purpose of this case, the defendant may, under the allegations of adverse possession, prove title derived from any source.

There is no substantial conflict in the evidence regarding the material facts in the case. The evidence shows that Ogden

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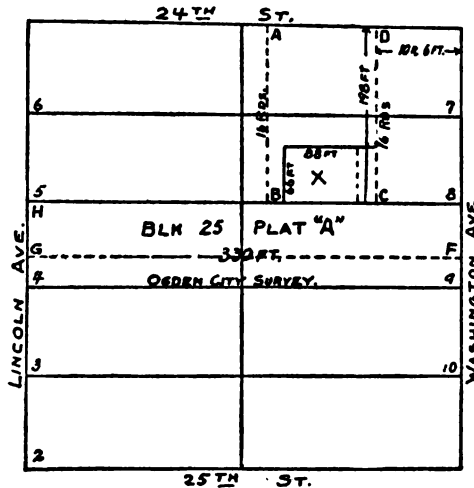
City was first surveyed, the streets and blocks platted, in 1853. In 1869 another survey was made, and the streets and blocks again platted. It seems that this survey, like the first, failed to locate monuments, and was in other respects deficient and unsatisfactory. In 1884 W. Jenkins, a civil engineer, who had resided in Ogden all his life, and who was in a general way familiar with the map of the city, was employed by the city to survey the streets and blocks and establish monuments. What was done by Jenkins in that regard I shall refer to later. In the year 1870 certain parties who had acquired possessory rights to parcels of land in lots 7, 8, and 9, respectively, in block 25, received deeds for their respective holdings from the mayor of Ogden City, who, it seems, held the land in trust for the occupants and owners thereof. In cases where the mayor was the grantee the deeds were executed by the city recorder. The evidence without conflict shows that in describing the different parcels of land referred to in the record, the initial or starting point, with but one exception, was the northeast corner of block 25. In some cases this point is referred to as "the northeast corner of lot 7 in block 25." In the exception referred to the starting or initial point was the northwest corner of lot 7. These corners are definitely located by the record, and there is no controversy, neither is there any conflict or uncertainty, in the evidence respecting their location.

For the purpose of clearly illustrating the location of Ford's land and the distance from the north boundary line of lot 7 to the south boundary line of lot 8 in block 25, as these lines existed when the deeds were executed, I invite attention to the following diagram, which is a fac simile of the plat incorporated in the abstract of title of Ford's ground except the dotted lines, the letters at either end of the lines, and the figures indicating the length of the dotted lines, which do not appear on the plat in the abstract of title. This abstract of title was introduced in evidence by Ford.

"A part of lot eight (8), block twenty-five (25), plat A, Ogden City survey, beginning at a point 198 feet south and 10 rods and 6 feet west of the northeast corner of lot seven (7) of said block twenty-five (25), and running thence west

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88 feet; thence south 66 feet; thence east 88 feet; thence north 66 feet to the place of beginning—subject, however, to a right of way over the east six (6) feet of said lands, situate in the S. E.  $\frac{1}{4}$  of Sec. 29, Tp. 6 N., R. 1 W., S. L. Mer. U. S. survey."



It is suggested that the abstract was offered by defendant for the purpose of showing how he "deraigned title." Conceding that it was offered and received in evidence for that purpose only, it nevertheless, when so considered, shows that the land in dispute is not covered by or included in any of the conveyances therein mentioned; in fact, it completely disproves and overthrows the very claim sought to be established by it. It is also suggested in the prevailing opinion that I refer (further along in this dissenting opinion) to a certain blue print showing the boundaries of Ford's land with respect to adjoining properties, as fixed by his record title as having been offered in evidence by the defendant. This is error. What I do say is: "The blue print was offered and received in evidence." No claim is made that the map is incorrect or misleading in any particular. I therefore thought when I prepared the first draft of this dissenting opinion (and still think) that it was immaterial which side introduced it in evidence. This map, or blue print, is referred to in the

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prevailing opinion as "the official map." I fail to find a scintilla of evidence in the record that even suggests that it is an official map; in fact, I think the evidence clearly shows to the contrary. The record shows that R. S. Corlew, a civil engineer, was employed by Ford to survey the ground and to make the map. Corlew was Ford's witness, and on cross-examination testified in part as follows:

"Q. In May, 1913, you went down there and took some measurements for Ford, didn't you? A. Yes, sir. Q. And you made a map of it? A. Yes, sir. Q. And some blue prints? A. Yes, sir. Q. Is this one of them? A. Yes, sir."

Later this blue print, Plaintiff's Exhibit B, was offered and was received in evidence as a part of plaintiff's cross-examination of Corlew. Conceding, for the purpose of this case, that the blue print, Exhibit B, was submitted to the authorities of Ogden City by Corlew (who was not even shown to be an attaché of the city engineer's office or any other department of the city government), and that it was accepted and approved by them as the official map of Ogden City of lots 7, 8, and 9, block 25, these being the only lots designated and traced on the map, it does not prove, or tend to prove, that defendant is, or ever was, the owner or in possession of the ground in dispute. Nor does it disprove, or tend to disprove, any allegation of the complaint. But, like the abstract of title herein referred to, it shows the south boundary of Ford's land to be exactly where the south side or wall of the shed was erected, and where the evidence without conflict shows it has been maintained by Ford and his predecessors in interest for approximately 33 years. The blue print is referred to again further along in this dissenting opinion.

I shall now proceed to review the evidence and specifically point out wherein it shows the title to the ground in question to be in the plaintiff, and, as I view the record, the groundlessness of defendant's claim of title.

On November 9, 1870, Lorin Farr, as mayor of Ogden City, conveyed by warranty deed to J. Browning part of lots 7 and 8 "beginning at the northwest corner of said lot 7, and running thence east 5 rods; thence south 16 rods; thence west 5 rods; thence north 16 rods to the place of beginning. This



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land is indicated on the diagram by the letters A and B. The dotted line represents the east boundary of this piece of land. On November 18, 1870, Thomas G. Odell, as recorder of Ogden City, conveyed by warranty deed to Lorin Farr parts of lots 7 and 8 "commencing 10 rods west of the northeast corner of said lot 7, and running thence west 5 rods; thence south 16 rods; thence east 5 rods; thence north 16 rods to the place of beginning." The dotted line between the letters C and D indicates the east boundary of this piece of ground. The record also shows that transfers by deed were made in 1870 of parcels of land in lots 7 and 8, other than those mentioned and that each piece of ground so conveyed extended from the north line of lot 7 south just 16 rods—264 feet—to the then south boundary line of lot 8. On June 4, 1870, Farr, as mayor of Ogden City, conveyed by warranty deed to David H. Peery a portion of lot 9 in block 25 "commencing at the northeast corner of lot 9, and running thence south 76 feet; thence west 330 feet; thence north 76 feet; thence east 330 feet to the place of beginning." The undisputed evidence shows that the then northeast corner of lot 9 was just 16 rods (264 feet) south from the northeast corner of block 25. The dotted lines from F to G and from G to H on lot 9, as sketched on the foregoing diagram, indicate the south and west boundary lines of this parcel of ground. It is admitted that this piece of ground "by mesne conveyances is now owned by the plaintiff," respondent herein. The evidence without conflict shows that when this deed was executed the width of each of the lots 7 and 8, north and south, was 132 feet only. The distance, therefore, from the north boundary line of lot 7 to the south boundary line of lot 8 was exactly 264 feet. It follows, therefore, that the ground in dispute is covered by and included in the deed from Farr, as mayor, to Peery. This is, or should be, decisive of this case unless the defendant has proved title by adverse possession.

During the 30 years intervening between the time of the first survey was made in 1853 and the Jenkins survey of 1884 large buildings, business blocks, were erected on lots 7, 8, and 9 in block 25. Some of these structures faced east on Washington Avenue, and others faced north on Twenty-fourth

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Street. One of these buildings, known as the Armstrong Block, was erected on the southeast corner of lot 8, and another, known as the Peery Block, was erected on the then northeast corner of lot 9. The south side of the south wall of the Armstrong Block and the north side of the north wall of the Peery Block are contiguous, and each is just 264 feet south from the northeast corner of lot 7, and extend west from Washington Avenue about 160 feet in a direct line of the south side or wall of the shed mentioned, and to within about 12 feet of the southeast corner of Ford's land. The unimproved portion of the ground immediately west of the Peery Building was therefore in the actual possession of the owners of the building, as much so as the back yard of a residence is in the possession of the owner and occupant of the residence. On March 9, 1874, 10 years before Jenkins surveyed and platted the streets and blocks of Ogden City, Farr conveyed by warranty deed to William Jennings and William H. Hooper a part of lots 7 and 8 in block 25. The ground upon which the shed hereinafter referred to was later erected is a part of the land included in and conveyed by this conveyance. The calls in the deed, as shown by the abstract of title introduced in evidence by Ford, locate the south line or boundary of the land exactly 16 rods (264 feet) south of the north line of lot 7. On January 9, 1877, Jennings and Hooper reconveyed the land last mentioned to Farr. The calls of this deed and the deed above mentioned are identical. No part of the strip of ground (2.2 feet in width) in controversy was included in or covered by either of the deeds. About the year 1879 three of Farr's sons went into possession of the property above mentioned as his tenants. One of the sons, Ezra Farr, was a witness in the case, and testified in part as follows:

"We put the shed up there; we drew a line there and thought that would be on our ground. The posts were set, the post holes were dug 2 or 2½ feet. The shed was built. The outside of the south side of the shed was board; the roof iron. It was a fence put up of wood posts and wiring and boards. Did not occupy anything south of the south line of that shed."

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It seems that in the prevailing opinion much weight is given to the testimony of Ezra Farr, wherein he says that when he and his brothers erected the south side of the shed they "were not particular as to the line," because the shed was only a temporary structure. I think it is wholly immaterial whether they used the utmost care to place the south side of the shed on the boundary line or were careless and indifferent in that regard. The fact is that the fence or shed was erected on the boundary line as fixed by the calls in the grantee's deed, and has been maintained there for approximately 33 years. On January 3, 1883, Farr conveyed by warranty deed to Corey Brothers the land described in the deeds of conveyance last mentioned. The calls of the deed are, so far as material here, as follows:

"Commencing 10 rods and 6 feet west of the northeast corner of said lot 7, and running thence west 50 feet; thence south 12 rods; thence west 38 feet; thence south 4 rods; thence east 5 rods and 6 feet; thence north 16 rods to the place of beginning."

The next to the last call, namely, running "thence east 5 rods and 6 feet" (88 feet), represents, as indicated on the foregoing diagram, the south line or boundary of the land conveyed. A. B. Corey, one of the grantees named in the last mentioned deed, was called as a witness, and testified in part as follows:

"I know the premises in dispute. I remember the shed:  
\* \* \* It was there when we went there, probably 1883.  
\* \* \* We never used the premises south of the south wall of the shed. That wasn't supposed to be ours. We were fenced off from using anything, and didn't have occasion to particularly. We didn't claim any land south of the shed. I understood that David H. Peery was the adjoining owner on the south."

In 1886 and 1887 George L. Corey, a member of the firm of Corey Brothers, purchased from the other members of the firm their interests in the land mentioned. The calls in the deeds by which these interests were conveyed to him locate the south boundary line of the land exactly in the place where the calls of the deed from Farr to Corey Brothers located

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and fixed it, namely, where the south side or wall of the shed stands. On July 20, 1899, approximately 16 years and 6 months after the land upon which the shed stands was conveyed to Corey Brothers, and approximately 20 years after the shed was erected, George L. Corey, by warranty deed conveyed the land to Ford. The calls of the deed describing and fixing the boundary of the land are as follows:

"Beginning 10 rods and 6 feet west and 198 feet south of the northeast corner of lot 7 in block 25, and running thence west 88 feet; thence south 66 feet; thence east 88 feet; thence north 66 feet to the place of beginning."

The letter X in lot 8 of the foregoing diagram indicates the land above described. The calls in the deed correspond exactly with the plat attached to and made a part of the abstract of title. The figures on the plat which is incorporated in and made a part of the abstract of title and the figures on the foregoing diagram are taken from, and correspond with, the calls of the deed from Corey to Ford. Ford testified that immediately after he took possession of the land he improved the south wall of the shed, which was out of repair, and that in 1902 he erected a brick building on the ground just north of the shed. On May 9, 1913, Ford had the ground he purchased from Corey surveyed by R. S. Corlew, a civil engineer. The engineer made a "blue print" showing the area of land and its location in lot 8 with reference to the adjoining properties. This is the blue print referred to in the prevailing opinion as "the official map." Corlew was called as a witness by Ford, and testified in part as follows:

"In making my survey I began at the monument of the intersection of Washington avenue and Twenty-fourth street."

This monument, as the record shows, was established by Jenkins in 1884. The blue print was offered and received in evidence, and reads:

"Survey of part lot 8, block 25, plat A, beginning 10 rods and 6 feet west and 198 feet south from the northeast corner of lot 7; thence west 88 feet; thence south 66 feet; thence east 88 feet; thence north 66 feet to beginning."

This part of the blue print, "the official map," is not set forth in the prevailing opinion. Corlew further testified:

“Following that measurement, the south property line of Ford’s premises was practically contiguous with the south line of the shed. Measuring 198 feet south of the line which is supposed to be the south side of Twenty-fourth street, and then measuring 66 feet, I come to the south side of the shed.”

Corey did not convey, nor is there any claim that he attempted or intended to convey, to Ford the strip of ground in dispute. The evidence without conflict shows that from about the year 1879 to and including July 20, 1899, approximately twenty years, neither of Ford’s predecessors in interest was in actual or constructive possession of the strip of ground in controversy or any part of it. Nor did any of them, at any time, or on any occasion, so far as this record discloses, claim any interest in or assert any right or title to any of the ground south of the shed. While Corey Brothers owned and were in possession of the land they recognized and accepted the south side or wall of the shed as the south line or boundary of their ground. A. B. Corey, referring to the land described in the deed from Farr to Corey Brothers and in the deed from George L. Corey to Ford, testified that the ground was “fenced off” by the south side of the shed from the land adjoining it on the south. And, as I have stated, Corey further testified that they (Corey Brothers) “never used the premises south of the shed”; that the land lying south of the shed “wasn’t supposed” to be their property; that he “understood” Mr. Peery owned the land south of and contiguous to the shed. At the time Ford purchased the property the south side or wall of the shed had been recognized and accepted by his predecessors in interest, the Coreys, as the boundary line between the land conveyed to him and the ground south of and contiguous to the shed. Ford therefore cannot, under the doctrine of *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009; *Young v. Hyland*, 37 Utah, 229, 108 Pac. 1124; *Rydalch v. Anderson*, 37 Utah, 99, 107 Pac. 25; *Binford v. Eccles*, 41 Utah, 453, 126 Pac. 333; *Christensen v. Beutler*, 42 Utah, 392, 131 Pac. 666, and *Tanner v. Stratton*, 44 Utah, 253, 139 Pac. 940, be heard to deny that the boundary line thus recognized and accepted is the true one. This is not a case where a grantee, after he takes possession of the land conveyed to him, dis-

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covers that one of the end or side lines of his land as indicated by fences or other improvements is not where it is located and described in his deed of conveyance. On the contrary, it is a case where the boundary line in dispute is marked and established by the improvements identically where the calls of the grantee's deed locate and describe it to be.

There are five lots in block 25 abutting on Washington Avenue. The deeds of conveyance forming the chain of title to the land purchased by Ford and the plat in the abstract of title of Ford's property, the blue print referred to in the prevailing opinion as "the official map," as well as the calls in the deeds from Farr to various parties of other parcels of land in lots 7 and 8, referred to and described in the abstract of title mentioned, show conclusively that from 1853 to the time Ford, in 1913, attempted to take possession of the strip of ground in question (approximately 60 years), the boundary lines of the different pieces of property so conveyed were established and have been maintained on the theory that each of these lots (7 and 8) has a frontage on Washington Avenue of 132 feet only. It is apparent that when block 25 was first surveyed and platted, and when the mayor of Ogden City in 1870 conveyed parcels of land in lots 7, 8, and 9 to the occupants and owners thereof, the area of this block was supposed to be 40 rods by 40 rods, and, as I have stated, each of the lots, 7 and 8, had a frontage on Washington Avenue 132 feet only. It seems, however, that when Jenkins surveyed and platted block 25 in 1884 it was discovered that it had a frontage on Washington Avenue of 40 rods and 7 feet. This was approximately 4 years after the deed from the mayor of Ogden City to Peery, was executed and after large business blocks had been erected on lots 8 and 9, in accordance with the boundary lines theretofore established. Whether this 7 feet of surplus land, so-called, was created by an error or mistake in making the first survey in 1853, or in the survey of 1869, or whether it was created by parties owning land in block 25 that faced and abutted on Twenty-fifth Street, encroaching upon the street to that extent, the record does not disclose, nor is it, in view of the admitted facts, important.

Jenkins, who, as stated, made an official survey of Ogden

City in 1884 and platted the streets and blocks, in his testimony, referring to the lots in block 25 abutting on Washington Avenue, said:

"They (the lots) are supposed to be equal. They are platted as being equal with the supposed frontage of 132 feet. Block 25 fronting on Washington Avenue is more than five times 132 feet—more than 40 rods—and I have distributed that (the surplus) equally among the lots."

But, as I have pointed out, when Jenkins thus undertook to arbitrarily change the established boundaries of the several pieces of property in lots 7 and 8, the Armstrong and Peery Blocks had been constructed. And the record also shows that at that time business buildings had been erected on lot 7 fronting on Twenty-Fourth street on property purchased by the owners on the theory that lots 7 and 8 extended south 264 feet only. The record title of these properties shows this. No changes were made in the boundary lines of lots 7, 8 and 9, so far as the record discloses, until Ford asserted that the land in dispute belonged to him. As I view the record, all that can be said in support of Ford's theory of the case is that, while each of the lots, 7 and 8, has an actual frontage on Washington avenue of 132 feet only, each lot nevertheless has a frontage on paper of approximately 133.5 feet.

In 2 Devlin on Real Estate, 1032a, the author says:

"When the platter of town lots has set stakes, purchasers may locate their lines accordingly, and such lines cannot be unsettled by a subsequent survey. Notwithstanding errors in locating them, they must control, and the question is not whether they were correctly placed, but whether they were platted by authority, and, relying on them, persons have purchased lots and taken possession." *Le Compte v. Lueders*, 90 Mich. 495, 51 N. W. 542, 30 Am. St. Rep. 450.

And again, in section 1032:

"If a survey is subsequently made which changes the location of a larger tract with which, according to the language of the deed, the land conveyed was located, or if the subsequent survey restricts the area of such tract, the title of the grantee is not divested nor his right impaired. *Widbur v. Washburn*, 47 Cal. 67.

Attention is invited to the decree of distribution in the matter of the estate of David H. Peery, deceased, admitted in evi-

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dence, wherein the piece of ground in dispute was distributed to the devisees under the will of said Peery and described as being in lot 8, block 25. Reference is also made to the fact that the land is described in the pleadings as being in lot 8. Keeping in mind that when Jenkins surveyed and replatted block 25 in 1884, he, by distributing the so-called surplus land in the block and adding to each lot its pro rata of the excess of ground, increased the width, north and south, of each of the lots 7 and 8 (on the official plat) 1.5 feet. I think it is evident that the decree of distribution of the land in dispute was had merely as a matter of precaution to protect the interests of the devisees under the will of said Perry in the event that the arbitrary act of Jenkins in changing the recognized and accepted boundary lines of the lots mentioned should be judicially approved and upheld. As I view the case, the decree of distribution has no material bearing on the issues involved. Nor do I think, under the circumstances, the mere fact that the land is described in the pleadings as being in lot 8 is decisive of the case. The south line of Ford's land is described in the chain of title which Ford put in evidence as being 171 feet west from the northeast corner of block 25 (which point is not in dispute), and 264 feet south from the north boundary line of lot 7, which point is also recognized and established. Nowhere in the chain of title is the land in dispute mentioned, nor is it included in any of the conveyances which constitute the chain of title to Ford's land. The pleader, looking to the official plat made by Jenkins in 1884, might well allege that the land is in lot 8. And I think it is plain that the strip is referred to in the pleadings as being in lot 8, because it so appears in the plat in which Jenkins, as stated, arbitrarily changed—moved south—the theretofore, as I view the case, recognized and accepted line between lots 8 and 9. There is, however, no uncertainty either in the pleadings or in the evidence respecting the exact location of the land in block 25 or the actual, physical boundary line between lots 8 and 9. It is alleged in the complaint:

“That when said lot No. 9 in said block and plat was platted by said Ogden City, the corners and exterior limits thereof



were not definitely marked on the land as land platted as aforesaid; that thereafter plaintiff and defendant, and their predecessors in interest, as well as other owners of the land in said lot, determined and located upon said lands the boundary lines of said lot, and also the lands of plaintiff, and erected upon said boundary line, determined as aforesaid, buildings and other structures in conformity with the determination of said last-mentioned boundary line, bounding said surplus on the north side thereof, and plaintiff and defendant and their said predecessors in interest, together with the other owners of the land adjoining the above-described land on the north and on the south of said last-mentioned boundary line, then and there determined said boundary line, and well and truly defined the same upon the ground by the erection of buildings and structures in conformity with said lines, which said determination has been acquiesced in by plaintiff and its predecessors in interest and the owners of lands adjoining plaintiff's said land on the north side thereof, as above described, for more than 20 years last past; that the defendant now disputes said northern boundary line of plaintiff's land, and against its will and without its consent has begun excavations upon said last-mentioned tract for the purpose of erecting a building upon plaintiff's said land, and extending about 2 feet and 6 inches south from said last mentioned, established and recognized boundary line on the north side of said lands."

Assuming, but not conceding, that there is a fatal variance between the proof and the allegations of the complaint as to the exact location of the land in question, I submit that equity demands that the cause be remanded to the trial court, with directions to permit plaintiff to amend its complaint to conform to the facts proved, and to modify the judgment accordingly or to grant a new trial. I think it is clear that, if plaintiff, in describing the land in controversy, had used the northeast corner of lot 7, block 25, as the initial or starting point, and then proceeded to locate the land without referring to either lot 8 or lot 9 by name, there would be absolutely no merit to this appeal. Ford introduced in evidence a number of tax receipts for taxes paid by him on his property in lot 8. These receipts show that he was assessed for a strip of ground

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88 feet in length by 2.2 feet in width in excess of what his deed calls for. He testified that he did not know how he "happened" to be so assessed. He also testified that he claimed to be the owner of the ground in controversy; but, on being asked to whom he made his claim, he answered: "I didn't make it to anybody." Ford's alleged possession of the strip of ground consisted in driving his horses into and out of his stables through a door that he cut in the south wall of the shed, piling manure and debris from his stables on the ground south of the shed, and by standing his wagons thereon when not in use. I do not think it will be seriously contended that the use Ford made of the land south of the shed, even when coupled with the payment of the taxes on more land than his deed calls for, vested in him the title to the ground in controversy. If these transactions are held to be sufficient to enable Ford to take and hold the property as his own, then the law recognizes a novel and easy method by which a party may clandestinely confiscate and appropriate to himself his neighbor's property.

Since the foregoing was written the Chief Justice has also written an opinion in which he favors a remanding of the case, with directions to the lower court to grant a new trial and to permit the parties to amend their pleadings, should they so desire. Without changing or in any way modifying anything contained in this opinion, I fully concur with the Chief Justice in remanding the case for a new trial, with the directions suggested.

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Stinson et al. v. Godbe, 46 Utah 468.

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## STINSON et al. v. GODBE, City Treasurer.

No. 2668. Decided July 19, 1915. (150 Pac. 967.)

MANDAMUS—ENFORCEMENTS OF SPECIAL ASSESSMENT—STATUTES. Comp. Laws 1907, section 258, requires that the total cost of improvements for paving shall be assessed as a special tax, and shall become delinquent in certain proportions each year. Section 282x6 provides that the city auditor, at the direction of the city council, shall issue warrants for the cost of paving, which shall be drawn on the treasurer. Section 282x8 provides that any special tax which shall not be paid before the date on which the first payment of the levy shall become delinquent shall be due in five or ten yearly installments, provided that one or more installments or the whole tax may be paid on the day any installment becomes due. A city ordinance provided that special taxes for paving should become delinquent in ten equal annual installments, and that one or more installments, or the whole of the warrant, might be paid on the day any installment became due. The ordinance provided that within ten days after delinquency, as fixed in the levy and notice of tax, the city treasurer should make up the list of all property upon which the tax remained due and unpaid, and cause the same to be published, and that on the day fixed for the sale the city treasurer should offer sufficient of the delinquent real estate to pay taxes and costs. *Held*, that the statutes and ordinance did not impose upon the city treasurer the power and duty to sell assessed property upon delinquency of an installment before the whole tax was due and delinquent with sufficient certainty to justify the direction of such action by the treasurer by *mandamus*.

Appeal from District Court, Third District; *F. C. Loofbourow*, Judge.

Mandamus by R. M. Stinson and Thomas Stockhausen, co-partners doing business as R. M. Stinson & Co. against Frank Godbe, as City Treasurer of Salt Lake City.

Judgment for defendant. Plaintiffs appeal.

AFFIRMED.

*Pierce, Critchlow & Barrette* for appellants.

*H. J. Dininny*, City Atty., and *Aaron Meyers* and *W. H. Folland*, Asst. City Attys., for respondent.

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STRAUP, C. J.

Salt Lake City let a contract to pave a street. By the terms of the contract the city agreed to pay the paving of the intersections out of its general fund; the balance "in special coupon warrants drawn by the city auditor upon the city treasurer in the amounts as provided by law, payable out of the special fund raised by special assessment upon the property included in said tax levy." The contract further provided:

"That attached to each of said warrants and forming a part thereof shall be ten coupons, numbered 1 to 10, showing the date when each installment of the principal sum mentioned in the warrants is payable and the rate of interest before and after delinquency, which interest shall be 6 per cent. per annum from the date of the approval of the ordinance confirming the levy of such tax until the date the amount named in the said coupon shall become due and after delinquency in the payment of each of said installments as represented by said coupons until paid at the rate of 8 per cent. per annum. Said warrants shall also provide that one or more installments or the whole of said sum named in the warrant may be paid on the day any installment becomes due by paying the amount thereof and interest to the date of such payment. It is understood and agreed that said contractor shall accept such special tax coupon warrants in full payment for work done and materials furnished under the contract to the amount of the sum named in each of said warrants and interest as therein provided, and that the city shall not be held liable for the payment of the cost of the improvement mentioned in said special tax warrants or for the payment of any special tax warrants issued as aforesaid, or for the payment of any of the coupons attached thereto, except to the extent of the funds received by it under the levy and assessment for said improvement; but the city shall be responsible for faithful accounting, collection, and settlement and paying the money of said funds, and, when such accounting, collecting, settlement, and paying is faithfully performed, all further liability on the part of the city shall cease, and it is hereby understood that the city will exercise the authority conferred upon it by law to collect said assessments."

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The paving was done in accordance with the contract. The attached warrants and coupons were sold by the contractor to the plaintiffs. The special tax was by the city levied and assessed against abutting properties payable in ten annual installments. The sixth installment of the assessment on particular property, amounting to \$30, became delinquent and remained unpaid. The plaintiffs demanded payment of the defendant, the city treasurer, who answered that he had no funds with which to pay the warrant. The plaintiffs then demanded of the treasurer that he take proper steps to sell the property. He refused to do that. The district court was then invoked by mandamus to compel him to proceed to sell the property, or sufficient thereof to pay the delinquent installment. The court denied the writ. From that judgment the plaintiffs appeal.

The statute (Comp. Laws 1907, section 258) requires that the total cost of improvements for paving purposes shall be assessed and levied as a special tax upon the property benefited at one time, and shall become delinquent, one-tenth of the total amount, fifty days after the levy, one-tenth in one year, and one-tenth each year thereafter for eight years. It further provides that each installment, except the first, shall draw interest at 6 per cent. and, after delinquency, 8 per cent. per annum until paid. It also provides that "the total cost of the improvements shall become delinquent at such time and in such installments, or the entire sum at one time, as the city council of such city may prescribe; but such entire sum shall not become delinquent in a less time than one year." Section 282x6 provides that the city auditor, at the direction of the city council, "shall issue coupon warrants in payment of the cost" of the paving, which "shall be drawn on the city treasurer and against the special tax funds," and which shall bear interest at the rate of six per cent. from date of levy until date of delinquency, and eight per cent. per annum from delinquency until paid. Section 282x7. Section 282x8:

"Any special tax which shall not be paid before the date on which the first payment of said tax levy shall become delinquent, shall be due and payable only in five or ten yearly installments, with interest as fixed by ordinance: Provided,

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that one or more installments, or the whole special tax, may be paid on the day any installment becomes due by paying the amount thereof and interest to date of payment."

The city by ordinance provided that special taxes for paving shall become delinquent in ten equal installments as follows: One-tenth of the total cost one year after confirmation of the levy, and one-tenth each year thereafter for nine years, and that the whole of the tax may be paid on the day any installment became due by paying the amount thereof with interest to date of payment; also that the special tax warrants shall bear interest at 6 per cent. per annum to date of delinquency and 8 per cent. per annum from delinquency until paid, and that one or more installments, or the whole of the warrant, may be paid on the day any installment became due by paying the amount thereof and interest to date of payment. There is nothing in the ordinance nor in the statute that upon failure to pay an installment the whole of the tax may be declared due and delinquent. The ordinance, after providing for notice of intention of levy, notice of the assessment and special tax, and for special tax warrants, etc., provides that:

"Within ten days after the date of delinquency, as fixed in the levy and notice of tax, the city treasurer shall make up a list of all property upon which the special tax remains due and unpaid, and cause the same to be published," etc.

It further provides:

"On the day fixed for the sale, the city treasurer, in person or by deputy, shall appear at the hour and place named in the notice of sale, and shall there offer sufficient of the delinquent real estate to pay taxes and costs at public auction to the highest responsible bidder for cash."

Other provisions are made by ordinance respecting costs, certificates of sale, tax sale records, redemption, tax deeds, etc.

It is not claimed that there is any authority upon delinquency of an installment to declare the whole of the tax due and delinquent. What the appellants contend for is that, when any installment becomes delinquent and is unpaid, it is the duty of the treasurer to take steps to sell the property, or sufficient thereof to pay such delinquent installment, and as each installment becomes due and delinquent and remains un-

paid to sell and resell the property, or sufficient thereof to pay the delinquent installments. That is denied by the defendant. He contends that he is not authorized to sell the property until the whole tax becomes delinquent and remains unpaid.

The tax is a special lien on the property. The holder of the warrant can only through the intervention of the city foreclose the lien, sell the property, and collect the tax. There is a clear power and duty conferred and imposed on the city and its treasurer at some time to do that. The serious question is: Is the power conferred and the duty imposed to sell upon delinquency of an installment and before the whole tax is due and delinquent? Because of the ordinance that "within ten days after date of delinquency as fixed in the levy and notice of tax the city treasurer shall make up a list of all property upon which the special tax remains due and unpaid and cause to be published," etc., the appellants argue that such delinquency clearly refers to any installment, and hence that it is the duty of the treasurer to sell whenever there is a delinquent and unpaid installment. When that provision of the ordinance alone is looked to there is considerable force to the contention; but when the whole ordinance relating to the levy and special tax, notices thereof, sale of the property, tax deeds, redemption, etc., is considered, the matter is not so clear. Before the court is justified by mandamus to direct the treasurer to sell on a delinquent and unpaid installment, such power and duty must be made to appear in express terms or by the clearest indubitable implication. They are not made to appear in express terms, either by the statute or the ordinance. Nor do we think them so clearly implied as to justify a direction in such respect by mandamus. If they were intended, such intent very readily could have been indicated. We think that has not been done, and that therefore the judgment should be affirmed with costs.

Such is the order.

McCARTY, J., concurs.

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FRICK, J.

I concur. At first blush I was of the opinion that the appellants should prevail. After further consideration and reflection, and after a thorough and careful examination of the state statute and city ordinances, I am forced to the conclusion that the city, through its treasurer, does not possess the power to do what is demanded, and hence cannot be coerced by *mandamus* to comply with the demand. It is now well settled, in this jurisdiction at least, that *mandamus* will not lie unless the duty to do the demanded thing is clearly imposed, upon the one hand, and the right to have the thing performed is equally clear, upon the other. I entertain a very serious doubt, to say the least, of the city's right to enforce a separate delinquent installment of the special tax in question by advertisement and sale of the property upon which the tax is a lien. The law, I think, is clear that, where no special remedy is given to enforce a tax or a tax lien, general or special, the ordinary or usual remedies must be resorted to. While in this case a special remedy is given to enforce the tax as a whole when it becomes delinquent, yet, as I read the law, no such special remedy is provided to enforce a separate delinquent installment. Some force to this conclusion is found in the fact that so long as the tax is not delinquent it only bears 6 per cent. interest, while on becoming delinquent it bears 8 per cent. until paid. The person holding a tax warrant is, therefore, in theory at least, compensated for the delay in payment by an increase in the rate of interest on his investment. We have recently held (*Lannan v. Waltenspiel*, 45 Utah, 564, 147 Pac. 908) that special taxes in this jurisdiction constitute a first lien upon the property. Special tax warrants, in the nature of things, are therefore abundantly secured. While it, no doubt, would give a better and firmer basis to the city's credit if the installments were enforceable as they become delinquent, yet that is a matter which must be regulated by the legislative, and not by the judicial, branch of the government.

The judgment should therefore prevail.



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## YOUNG et al. v. WHITAKER.

No. 2438. Decided July 19, 1915. (150 Pac. 972.)

1. **BROKERS—RIGHT TO COMPENSATION—SUFFICIENCY OF EVIDENCE.** In an action by real estate brokers for a commission, evidence held to sustain findings that the sale was not procured by plaintiffs. (Page 478.)
2. **BROKERS—RIGHT TO COMPENSATION—EMPLOYMENT OF SEVERAL BROKERS.** Where plaintiffs, real estate brokers, asked defendant realty owner for the terms upon which he would sell, he answering, but giving them no exclusive agency, and thereafter the owner, upon the request of another broker, likewise gave him quotations, and he succeeded in effecting a sale of the property, the owner paying a commission thereon, the owner was not liable to plaintiffs for a commission, since where several brokers are openly employed, the entire duty of the seller is performed by remaining neutral between them, and he may sell to a buyer produced by any of them without being called upon to decide at his peril between the several brokers as to which was the primary cause of the purchase. (Page 483.)

Appeal from District Court, Third District; Hon. T. D. Lewis, Judge.

Action by L. H. Young and J. A. Young, partners as Young & Young, against E. A. Whitaker.

Judgment for defendant. Plaintiffs appeal.

**AFFIRMED.**

*Young & Moyle* for appellants.

*Pierce, Critchlow & Barrette* for respondent.

**FRICK, J.**

The plaintiffs brought this action in June, 1909, to recover the sum of \$1,262.50 as a commission which they alleged was owing them by the defendant for procuring a purchaser who was able and willing to purchase certain real estate owned by the defendant. After making the necessary allegations of inducement, and that the plaintiffs were duly authorized by the

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defendant to sell certain real property in Salt Lake City, describing it, owned by the defendant, the plaintiffs in their complaint alleged:

“That plaintiffs undertook to sell said property for defendant in accordance with said authority and agreement, and on or about May 5, 1909, plaintiffs procured a purchaser for said property, able and willing to buy the same upon the terms above mentioned, and fully complied with all the conditions required by defendant to be performed by plaintiffs in regard thereto.”

The plaintiffs therefore prayed judgment for said sum of \$1,262.50. The defendant being a nonresident of the state of Utah, and absent therefrom, being a resident of East Oakland, Cal., the action was commenced by attachment. The defendant appeared and answered the foregoing complaint, admitting that in the month of April, 1909, he was the owner of the property described in the complaint, but denied that after the 25th day of said month he was—

“the unqualified owner of said property, or in the unqualified possession thereof, and that at no time after said date did he have the unqualified right of disposition thereof, all of which was well known to plaintiff.”

The defendant, in effect, denied all other allegations of the complaint. The case was tried to the court without a jury on the first days of November, 1911. After the trial had been concluded, the plaintiffs, over defendant's objections, obtained leave to file, and did file, an amended complaint, in which they set forth an additional cause of action, alleging, in effect, that through their efforts the property had been sold to the purchaser, and for that reason they were entitled to receive the aforesaid sum as a commission. The defendant answered the amended complaint, and in effect denied each of the allegations therein contained, and also set up affirmative matters in defense, which need not be stated here. The court made the following findings of fact:

“(1) That plaintiffs are, and were at all times, duly licensed real estate partners engaged in the real estate business in Salt Lake City, Utah. (2) That in the month of April, 1909, and for a long time prior thereto, defendant was the

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owner and in possession of a certain piece of property \* \*  
\* known as No. 124 South Main street; but at no time after April 25, 1909, was he the unqualified owner of said property, or in the unqualified possession thereof, and at no time after said date did he have the unqualified right of disposition thereof—all of which facts were known to plaintiffs. (3) That during the years 1908 and 1909, defendant was residing in East Oakland in the state of California. That in response to letters written by plaintiffs to defendant, requesting defendant to state the price at which he would sell said real estate, defendant did, on or about December 10, 1908, and again on or about February 2, 1909, write to plaintiffs that he would sell said premises for \$48,000, one-half cash and the balance to be secured by mortgage, deferred payments to draw interest at 6 per cent.; this price to include the regular real estate commission. That the real estate market in Salt Lake City was active from those dates until the 22d day of April, 1910, and for some time thereafter, but plaintiffs made no sale of said property up to the latter date, but did, on said later date, make a counter offer to defendant, and did endeavor to get defendant to sell said property at the price of \$45,000, being \$3,000 less than defendant's price on said property, and again on the 29th day of April, 1910, did make another counter offer to defendant, and did offer to give defendant \$50 for a 10 days' option on said property. (4) That the price quoted to plaintiffs by defendant, and any authority to sell said premises under such quotation, was not an exclusive price or an exclusive authority, which fact plaintiffs knew. That defendant had, early in the year 1909, at the request by letter of one A. C. Sadler, who was then a regularly licensed and active real estate agent in Salt Lake City, Utah, written to said A. C. Sadler, quoting him a price upon said property, which price so quoted to said Sadler was the same price for said real property as that quoted to plaintiffs, to wit, \$48,000. (5) That on or about April 25, 1909, said A. C. Sadler effected a sale of said real estate at the defendant's price of \$48,000, which sale was thereafter carried out by defendant. (6) That the said sale was made to Poulton, Madsen, Owen & Co., a corporation, which company thereafter transferred its con-

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tract of purchase to George Romney & Sons Company, a corporation, to which latter company the deed for said property was executed and delivered, and by whom the mortgage to secure the balance of the purchase price was executed and delivered. (7) That plaintiffs had offered the said property to said Poulton, Madsen, Owen & Co., and had attempted to negotiate a sale of said property to that company, as well as to a number of other possible purchasers, but had never effected a sale of said property, either to said Poulton, Madsen, Owen & Co., or to any other person, and plaintiffs were not the efficient or moving cause of making the sale to said Poulton, Madsen Owen & Co., or of procuring said company as a purchaser. That the said real estate agent A. C. Sadler, was the efficient and moving cause of making the sale to that company, and of procuring that company as a purchaser. That the said Sadler, in negotiating with said Polton, Madsen, Owen & Co. for the sale of said property to said company, acted independently of the said plaintiffs, and upon his own initiative. That plaintiffs were not the first to bring the attention of said company to said property, or to the fact that defendant would sell the said property; but after the said company had had its attention brought by other persons to the said property, and to the fact that the property was for sale, and had become interested therein, then the plaintiffs did procure information with regard to the property, the terms and duration of an existing lease thereon, and the terms of sale, and they were the first to endeavor to sell the said property to said company. (8) That the defendant paid said Sadler the regular real estate commission for making the said sale, \$1,262.50, and has not paid the plaintiffs said or any other sum. (10) That plaintiffs did not procure a purchaser for said property prior to said sale made by said Sadler, and notice to them of said Sadler's sale, and did not at any time procure a purchaser within the time or terms of defendant's offer. (11) Defendant acted impartially as between plaintiffs and said Sadler, and there is nothing due plaintiffs from defendant."

The court made conclusions of law upon the foregoing findings of fact, and entered judgment in favor of the defendant, from which the plaintiffs appeal. Counsel for appellants, in

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their brief, stated the question presented on this appeal in the following words:

"Appellants rely on their specification of errors set forth in the abstract at pages 52 to 54, and the errors may all be considered under the general assignment that the court erred in finding the issues in favor of respondent and against appellants, and in finding that Mr. Sadler was the procuring cause of the sale made, and that appellants were not the procuring cause. There is no evidence to support any such findings \* \* \*"

We have set forth the findings in full to show just upon what facts the court based its conclusion and judgment, and further to show that the court had very fully considered and found the facts upon every possible phase of the case. The evidence, to a very large extent, was documentary, consisting of letters and telegrams passing between plaintiffs and the defendant, and between A. C. Sadler and the de- 1  
fendant. As to that evidence there was no conflict. There was, however, some conflict in the oral evidence which the court heard in connection with said documentary evidence. The case being a law case, however, it was the exclusive province of the trial court to determine the weight that should be given to the statements of any witness or witnesses and, in case of conflicting statements, to determine which one of the witnesses should be given credence. It is conceded upon all sides that the facts of this case are somewhat different from what they usually are in such cases. Very briefly stated, the controlling facts are: That plaintiffs and one A. C. Sadler were real estate brokers in Salt Lake City. The defendant was a resident of East Oakland, Cal., and was the owner of certain real estate in Salt Lake City. On the 7th day of December, 1908, the plaintiffs wrote the defendant, asking him to give them his best price on the property in question, stating that they had a purchaser therefor "if they could give the right kind of a price." On December 10th the defendant wrote plaintiffs, stating that he would sell the property for \$48,000 "including a regular commission." Nothing came of this, and on January 28, 1909, plaintiffs again wrote the defendant, asking him whether they were still at liberty to sell

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at the price of \$48,000 and asked what amount he would take as the "lowest first payment." Defendant, on February 2d following, answered that he would sell the property for \$48,000 "with regular commission." One-half cash and 6 per cent. interest on deferred payments. Again nothing came of this, and on March 29, 1909, plaintiffs again wrote defendant, advising him that a party—"has just told us that he has \$12,000 cash, and if you would consider a proposition of four payments made annually, with interest at 6 per cent., he believes he would take it" [the property in question].

On April 2d following, the defendant wrote plaintiffs, declining their proposition of March 29th, and advised them that he had given—

"a party my price and with the conditions they suggested in their last letter; unless the client he has should change his mind. I should hear from them in the next few days one way or the other. Of course I feel it a duty to give them time to answer. My last letter to them was sent the same day you wrote me, March 29."

On April 22, 1909, plaintiffs wired defendant thus:

"Are offered \$30,000. Cash \$15,000. Two years five per cent."

Defendant answered:

"Will not accept offer of \$45,000.00."

On April 29, 1909, plaintiffs wired defendant as follows:

"Will give \$50.00 on purchase price of \$48,000.00 \* \* \* to be forfeited if deal is not made within ten days."

To this defendant answered:

"Your wire of the 29th came duly to hand. In answer will say a party has placed a deposit on the price you offered. Of course the deal may not go through. I expect to and will give them a reasonable time to get their funds in."

On April 30, 1909, plaintiffs wired defendant:

"Have sold your Main Street property for forty-eight thousand. Pro rate taxes ten days from receipt of abstract for examination of title. One-half cash, balance two years at six per cent. Answer our expense."

Defendant on said day answered as follows:

"Property sold. Await my letter of 29th."

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On May 3d following, the plaintiffs again wrote the defendant a lengthy letter, in which they said:

"Your letter [of the 29th of April] makes it possible for us to still be in the race for the sale of your property, as the parties placing the deposit may fall down."

In that letter plaintiffs also asked who the parties were, and the defendant, in response to that request, on the 5th day of May, 1909, wired them as follows:

"Letter third received. Poulton-Madsen are the parties trying to buy through A. C. Sadler."

On the same day plaintiffs wired defendant:

"Positively Poulton-Madsen are our people. When does the option expire? Moyle ready to close deal. Await our letter."

Then follows a long letter from the plaintiffs to the defendant, in which they claim that they could submit proof that they had been negotiating with Poulton-Madsen, and, among other things, said:

"Mr. Poulton has spent hours in our office in the past three months trying to get a lease or buy something through us. Now Mr. Whitaker, we don't believe that this firm can raise this money and our own party is ready to pay the price on the terms submitted."

There is much more in that latter, but it is not necessary to set it forth here. Defendant answered it on May 10, 1909, and on the 11th, before plaintiffs received his answer, he wired them thus:

"After writing you yesterday received telegram saying money is up, deal closed."

On May 12, 1909, the plaintiffs wired defendant as follows:

"We agreed to deliver property. Client raised money. Will be embarrassed if unable to deliver. Will guarantee you free from all liability to Sadler or his clients. Are writing."

It was shown that this telegram was instigated and dictated by the "client" referred to in the telegram. On May 22, 1909, plaintiffs again wired defendant as follows:

"Reported other parties have purchased property at advanced price. Moyle is and always has been ready to close at

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price and terms agreed upon. Twenty-four thousand dollars in Utah Commercial and Savings Bank, subject to your order and deed. Title demanded or litigation. Wire answer immediately."

The defendant answered this telegram on the 23d thus:

"Sent telegram to you on the eleventh, saying deal closed. I never authorized you to accept Moyle's proposition."

On the 24th of May, 1909, plaintiffs closed the correspondence with the following telegram to the defendant:

"We claim regular commission for procuring purchaser for Main Street property. Do you acknowledge claim? Wire answer."

Whether defendant answered or not is not shown nor is it material.

The correspondence between defendant and A. C. Sadler by letters and telegrams was also produced at the trial. We do not give all of that correspondence even in condensed form. Mr. Sadler, like the plaintiffs, also importuned the defendant to give the former leave to sell the property to a prospective purchaser which he had in view. This letter was dated March 13, 1909, and the defendant answered it on the 16th of the same month by giving Mr. Sadler the same price and terms he had given the plaintiffs in answer to their request. Considerable correspondence ensued between Sadler and the defendant. On April 19, 1909, Sadler in a letter to the defendant made him a definite proposition for the property, namely, \$18,000 cash, and "\$30,000 for three to five years," and asked for the best rate of interest. On the 24th Sadler wired the defendant as follows: "Wire my expense answer to proposition in my letter nineteenth." On the 22d of April, 1909, and apparently before Sadler had received the letter when he wired on the 24th, the defendant had answered Sadler's letter of the 19th thus:

"I have your favor of the 19th inst. In reply will accept \$18,000 cash payment with a first mortgage back on same property to me for \$30,000 for two years, interest at five and one-half per cent. per annum. All taxes to be paid by the buyer after transfer."



To this Sadler answered by wire on April 25, 1909, as follows:

“Proposition of the 22d accepted. Five hundred dollars received to bind bargain. Wire acceptance.”

There was some additional correspondence between Sadler and the defendant, and the deal was finally consummated upon the terms before stated on May 24, 1909, when the deed was forwarded by the defendant and the money paid, and the whole matter closed up. Some time was required to straighten out some technical defects in the title. It was also shown that neither the plaintiffs nor Mr. Sadler directed the purchaser's attention to the property in question. Both the plaintiffs and Mr. Sadler were informed by a third person that the purchaser thought favorably of buying the property in question if satisfactory terms and price could be made with the defendant. Upon the information given plaintiffs by such third person that “Poulton-Madsen” desired to purchase the property in question if some one could obtain a satisfactory price and terms from the defendant, they volunteered to make an attempt to obtain the lowest price and terms from him for said firm. The same is also true with respect to Mr. Sadler. All of them, therefore, were drawn into the matter to aid “Poulton-Madsen,” the ultimate purchaser, rather than the defendant. The fact, however, is that Poulton, Madsen, Owen & Co. were in fact only the nominal purchasers, as all the money that firm put into the property was \$2,500 the \$500 which was put up as a forfeit, and \$2,000 in addition. The Romneys, under a special agreement with Poulton, Madsen, Owen & Co., advanced that firm \$15,500 to make up the \$18,000 which constituted the first payment, and in consideration therefor said firm agreed that the Romneys should take the title and execute the \$30,000 mortgage, and in case that firm paid to the Romneys, at any time within 10 years, a premium of \$9,500 (less the amount advanced by said firm), then the title should pass to said firm, otherwise it would remain in the Romneys. It was through the instigation of Sadler with the aid of one of the Romneys, a young man, that the Romneys were interested and induced to advance the money to purchase the property. In consideration of young Romney's help in procuring the

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money, Sadler agreed to, and did, divide the commissions received from the defendant with the young man. It is manifest, therefore, that Poulton, Madsen, Owen & Co., could not and would not have purchased the property from plaintiffs unless they had been able to obtain the money through Sadler's help from the Romneys. It was through the efforts of Sadler, therefore, and not through those of the plaintiffs, that the sale of the property was ultimately effected. The court's findings are therefore sustained by at least some substantial evidence that:

"Plaintiffs were not the efficient and moving cause of making this sale to said Poulton, Madsen, Owen & Co., or of procuring said company as a purchaser."

And also:

"That A. C. Sadler was the efficient and moving cause of making the sale to that company and of procuring that company as a purchaser."

Notwithstanding the foregoing facts, however, plaintiff's counsel insist that the judgment is contrary to law. The law which counsel contend controls this case, they say, is stated by the Supreme Court of Nebraska in the second headnote preceding the decision of *Lewis v. McDonald*, 83 Neb. 2 694, 120 N. W. 207. The headnote in question which controls the decisions in Nebraska reads as follows:

"As between two brokers, through each of whom negotiations for the sale of land were made with a prospective purchaser, he who can show that his agency was the effective cause of the sale is entitled to recover the broker's commission."

Counsel further contend that the following statement, taken from the opinion in that case, correctly states the law applicable to the case at bar, namely:

"As between two brokers, he is entitled to recover who can show that his efforts resulted in the sale of the land. If the sale is the result of efforts exercised by both brokers, the rule seems to be that the one who first brought the seller and purchaser together is entitled to the commission. By bringing the seller and purchaser together we do not mean necessarily that he must introduce them to each other, but that, if his efforts result in bringing the minds of the two to an agreement resulting in the sale and purchase of the land, then, within the meaning of the law, he has brought them together."

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The following cases are cited as supporting the foregoing statement of the law, and are all relied on by counsel: *Butler v. Kennard*, 23 Neb. 357, 36 N. W. 579; *Holland v. Vinson*, 124 Mo. App. 417, 101 S. W. 1131; *McCormick v. Henderson*, 100 Mo. App. 647, 75 S. W. 171; *Peckham v. Ashhurst*, 18 R. I. 376, 28 Atl. 337; *Hovey v. Aaron*, 133 Mo. App. 573, 113 S. W. 718; *Hogan v. Slade*, 98 Mo. App. 44, 71 S. W. 1104; *Beougher v. Clark*, 81 Kan. 250, 106 Pac. 39, 27 L. R. A. (N. S.) 198; *Jennings v. Trummer*, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680; *Gregory v. Kennedy Bros.*, 82 Kan. 565, 109 Pac. 400.

The writer is not prepared to concede all that is said in all of the foregoing cases to be the law, but he concedes that all of them support the opinion as it is laid down by the Supreme Court of Nebraska in the case quoted from. It is also conceded that all of the cases cited are clearly decided right upon facts there stated. We are of the opinion, however, that the facts in the case at bar clearly distinguish it from all the cases we have just cited, and from all others referred to by plaintiffs' counsel. The case at bar, we think, comes squarely within the principle laid down by the Supreme Court of Washington, in the case of *Dalke v. Sivyer*, 56 Wash. 462, 105 Pac. 1031, 27 L. R. A. (N. S.) 195, and cases there cited. That case is annotated in 27 L. R. A. (N. S.) 195, *supra*, and we refer the reader to the cases cited by the annotator in the notes. In *Dalke v. Sivyer*, *supra*, after stating the general rule substantially as it is stated by the Supreme Court of Nebraska, in the case quoted from, the court, in the course of the opinion, says:

"It is also well settled that where an owner or agent lists property with different brokers for sale, the contract, not being exclusive the brokers run a race in energy for the prize, viz., the commission; that they enter into a competition in this respect, and that no matter how much effort or time a broker may have expended in attempting to make a sale, he cannot complain if his competitor reaches the goal before he does by securing a purchaser who is ready, able, and willing to purchase."

Counsel also cite and rely on the following case from the Supreme Court of Tennessee, to wit: *Glascock v. Vanfleet*,

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100 Tenn. 603, 46 S. W. 449, where the rule is stated in the headnote in the following words:

"Where real estate is placed in the hands of several brokers for sale, who act independently of each other, the one who first completes the sale is entitled to the commission, though another broker had first informed the purchaser of the property, quoted figures on it, and consented to submit to the owners any offer above a certain sum, but had not notified either the owners or the broker effecting the sale of the possible purchaser."

In *Vreeland v. Vetterlein*, 33 N. J. Law, 247, the decision is reflected in the following headnote:

"Where several brokers are openly employed, the entire duty of the seller is performed by remaining neutral between them, and he has the right to make the sale to a buyer produced by any of them, without being called upon to decide between the several agents as to which of them was the primary cause of the purchase."

To the same effect are *Francis v. Eddy*, 49 Minn. 447, 52 N. W. 42; *Platt v. Johr*, 9 Ind. App. 58, 36 N. E. 294; *Scott v. Lloyd*, 19 Colo. 401, 35 Pac. 733. Where, as in the case at bar, the brokers apply to the seller for authority to sell property to a purchaser they have in view, and the owner grants them permission to sell, and acts in perfect good faith in selling the property to a purchaser produced by one of the brokers, we cannot see under what rule of law or justice the owner may not safely pay the commission to the one who in fact produced the purchaser. We further think that he is not required to first determine just what the other broker may have done in trying to effect a sale to the actual purchaser. If such is not the law, then as against the owner of property the broker who first obtains the authority to sell, in legal effect, always has an exclusive right, at least as against the owner of the property, and the owner is never safe in selling through another broker unless such owner is prepared to show that the first broker's efforts had no effect whatever in inducing the real purchaser to buy the property. This, in our judgment, is not the law. While it is true that when the owner authorizes more than one broker to sell his property, he must act in perfect good faith and with strict impartiality in making a sale, yet where as here it is clearly understood by the broker

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suing for the commission that another broker was also authorized to sell the property and was negotiating to do so, then, in our judgment, the law, as it is stated in *Vreeland v. Vetterlein, supra*, controls. For the reasons already pointed out, the facts in the case at bar are even stronger against the plaintiffs than is required by the ruling in *Vreeland v. Vetterlein*. Here the plaintiffs at no time before the property was actually sold produced a purchaser that was able to purchase for the price and upon the terms required by the defendant. Poulton, Madsen, Owen & Co. certainly were not able to purchase until the Romneys provided the funds, and they were induced to provide them, not through anything plaintiffs did, nor through any efforts they made, but through those of young Romney and Mr. Sadler. Plaintiff's claim, so far as the sale to that firm is concerned, must therefore fail, and for stronger reasons than those stated in *Vreeland v. Vetterlein, supra*. But, say plaintiffs' counsel, if no recovery can be had on the sale made to Poulton, Madsen, Owen & Co., yet under the law plaintiffs ought to recover because they interested Mr. Moyle in the property, and that the evidence is conclusive that he was able, ready, and willing to purchase at the price and upon the terms and conditions demanded by the defendant. A complete answer to that claim is that plaintiffs did not produce Mr. Moyle until after the offer made by Mr. Sadler had been accepted by the defendant. Surely the defendant was not required to hold the property until the plaintiffs could find some one who was able, ready, and willing to purchase. The defendant had a right to sell at any time, subject, it is true, to plaintiffs' rights in the premises. But as plaintiffs had no special rights since they did not have the exclusive right to sell, the defendant acted well within his rights when he accepted Sadler's offer, which was in fact made and accepted before Mr. Moyle's offer to purchase was made.

We are of the opinion, therefore, that, in view of the facts and circumstances of this case, the judgment of the district court is right, and it accordingly is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

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Appeal from Fourth District.

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SPANISH FORK CITY et al. v. SPANISH FORK EAST  
BENCH IRR. & MIN. CO. et al.

No. 2712. Decided July 19, 1915. (151 Pac. 46.)

**INJUNCTION—CONTEMPT—DISOBEDIENCE OF DECREE.** Comp. Laws 1907, section 1288x25, as amended by Laws 1911, c. 43, provides that any appropriated water may be turned into the channel of any natural stream, and be taken out again either above or below the point where it was turned into the stream, if the original water is not diminished. Defendant, in contempt proceedings for disobedience of the court's decree, had turned water derived through the United States Reclamation service into a river, and, in good faith and under a claim of right, had appropriated water of no greater amount from a point above where it had been turned in. *Held* that, even if one might not turn water into a stream and divert it from another point without applying to the court having jurisdiction and obtaining permission to transfer the water therein and having the court fix the point of diversion and provide a proper measuring device, as the water diverted by defendant was his own and did not belong to the original appropriators and could not have been adjudicated by the prior decree, defendant was not guilty of contempt.

Appeal from District Court, Fourth District; Hon. A. B. Morgan, Judge.

Action by Spanish Fork City and others against Spanish Fork East Bench Irrigation & Mining Company and others, in which D. A. Mitchell was proceeded against upon affidavit charging contempt in disregarding a decree of the court.

Judgment finding Mitchell guilty of contempt. He appeals.

REVERSED AND REMANDED, with directions.

*J. W. N. Whitecotton* for appellants.

*Elias Hanson* for respondents.

FRICK, J.

This is a contempt proceeding commenced against D. A. Mitchell. In the affidavit initiating the proceeding it is, in

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Spanish Fork City et al. v. Spanish Fork East Bench Irr. & Min.  
Co. et al., 46 Utah 487.

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substance, alleged that in April, 1899, a certain decree was duly entered in the district court of Utah County, wherein the rights of the waters of Spanish Fork River in said county were duly adjudicated and apportioned among the several claimants thereof, all of whom were parties to said decree; that on or about the 12th day of August, 1913, said Mitchell, "in willful disregard of said decree and injunction, and in contempt of the same, and wrongfully, and in disregard of the rights of the plaintiffs and defendants, \* \* \* diverted and used for the purpose of irrigation a large quantity of the waters of said Spanish Fork River to which the plaintiffs and the defendants were entitled," and to which said Mitchell was not entitled, all of which acts, it is alleged, were contrary to said decree and in contempt thereof. A citation was duly issued by said court, and said Mitchell appeared and filed an answer to said affidavit, in which he admitted the decree aforesaid, and practically denied all of the other allegations contained in the affidavit. For a further answer and defense he, in effect, averred that at the time when it is alleged in said affidavit that he had diverted water from said Spanish Fork River he was the lawful owner of a certain quantity of water flowing in said stream, and that he had diverted and used the water so owned by him, and no other, and no more. At the hearing the attorneys for the respective parties in open court stipulated as follows:

"Mr. Whitecotton: D. A. Mitchell, if your honor please, is the one served and making this stipulation. We agree and stipulate that the matters set out in the affidavit filed for this order, as relates to the entering of the decree in 1899, and the terms therein specified, are as alleged in the affidavit; and we admit that at about the time stated we diverted from the headwaters of Spanish Fork River, or one of the tributaries of Spanish Fork River, water which we used for irrigation. We deny any contempt of the decree of this court, or any intention to disregard the court's decree, and in justification of our acts say that prior to this controversy now before the court, these defendants herein cited to appear purchased from the United States Reclamation service seven second feet,

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Appeal from Fourth District.

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more or less, and that we caused that water to be turned into the supply of Spanish Fork City, or of the plaintiffs into Spanish Fork River, and that the water which we are using above, which we admit we are using as charged, we are using as an offset, as we claim, for what we have turned into that river, but it is too low down for us to get it high enough up for our use. And that is the justification that we offer of our conduct, and we deny that we are in any contempt of the court.

"It is further agreed by the parties that the quantity of water taken out by us is not in excess of that which we furnish to the plaintiffs in this case in the river. It is also stipulated that this river is a natural channel, a natural waterway, and that for every drop of water we have taken out higher up, we supply an equal amount, in respect to both quantity and quality below. Upon that state of facts the respondent rests his defense and asks to be hence dismissed with costs.

"Mr. Hanson: Now, if the court please, there are one or two other stipulations that we would like to add to what Brother Whitecotton stated. The questions are these: That the waters which are leased by the United States government were leased to one Lant and Reese, of Payson, who attempted to divert that water through the Salem canal, they sold it to certain defendants, including this defendant, D. A. Mitchell.

"Mr. Whitecotton: We will accept that."

It was also agreed that the water in question was diverted without the consent of the other parties to said decree, and without having been measured by the county surveyor. It was agreed, however, that the water taken by Mr. Mitchell was measured by the water commissioner of Spanish Fork River and by Mr. Mitchell.

Upon substantially the foregoing facts the court made findings of fact and conclusions of law, in which it was found that the defendant D. A. Mitchell was guilty of contempt, and judgment was entered accordingly, from which he appeals.

Plaintiffs' claim and the court's action are apparently based upon the decree of 1899, while Mr. Mitchell's defense is based on Comp. Laws Utah 1907, section 1288x25, as amended by chapter 43, Laws Utah 1911, p. 60, which reads as follows:



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Spanish Fork City et al. v. Spanish Fork East Bench Irr. & Min. Co. et al., 46 Utah 487.

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“Any appropriated water may be turned into the channel of any natural stream, or into a reservoir constructed across the bed of any natural stream, and commingled with its waters and then be taken out, either above or below the point where emptied into the channel, but, in so doing, the original water in such stream or reservoir must not be diminished in quantity or deteriorated in quality.”

It will thus be seen that under the stipulated facts the defendant Mitchell clearly had the right to assume that he was keeping within at least the letter of the law of this state relating to the turning of water into a stream which is intended to be diverted therefrom by the owner or claimant thereof at some other point on the stream. Plaintiff's counsel, however, insists, and the trial court was apparently of the same opinion, that under the statute quoted one may not turn water into a stream the water of which has been appropriated, adjudicated, and apportioned, and at some other point on the stream divert the water so turned in, without first applying to the court having jurisdiction of the water in the stream and obtaining its permission to interfere with the water in said stream, and have the court fix the point of diversion and also provide for a suitable and proper measuring device so as to protect the rights of all the water users on the stream. Let it be conceded that the foregoing would be a proper, prudent, and safe method of procedure, yet there is nothing in the law, which authorizes the commingling of water, requiring it. Moreover, if the person who turned water into a stream, which he diverted at some other point thereon, in so doing interfered with the substantial rights of any one having an interest in the water flowing in the stream, the courts would have ample power to prevent or to arrest any wrong that might arise in that regard. Again, if it were assumed that the defendant Mitchell should have done something more than he did in turning in and in diverting the water in question, yet his failure in that regard would not necessarily constitute a contempt of court. The water claimed and used by Mr. Mitchell, it is agreed by all, was turned into, that is, added to, the volume of water flowing in the stream, and the water turned in by him was of the character and quality flowing therein. The water he di-

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Appeal from Second District.

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verted was therefore his own, and did not belong to the original appropriators, and was not, and could not have been, adjudicated and apportioned by the decree of 1899. How, then, could Mr. Mitchell have been guilty of a contempt of court for interfering with water which was adjudicated by that decree? A person is not guilty of a contempt of court every time he does something which interferes with adjudicated rights, so long as he, in good faith, claims something which was not a part of the subject of litigation upon which the decree in question is based, even though what he claims in some way touches or effects the subject litigated. That, at the very most, is all that Mr. Mitchell did under the undisputed facts of this proceeding. All that we do or can determine, therefore, in this proceeding is that under the agreed facts the defendant Mitchell was not guilty of contempt, and hence the court erred in its conclusion of law and judgment.

The judgment is reversed, and the cause is remanded to the district court of Utah County, with directions to set aside its findings of fact and conclusions of law, and to vacate the judgment based thereon and to dismiss the proceeding at plaintiffs' costs. Appellant to recover costs on this appeal.

STRAUP, C. J., and McCARTY, J., concur.

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WHITMEYER v. SALT LAKE & O. RY. CO.

No. 2755. Decided July 20, 1915. (151 Pac. 48.)

1. CARRIERS—SPUR TRACK—CONSTRUCTION—PUBLIC USE. Car barns of a railroad company necessary for the convenient and economical handling of its cars and electric locomotive and the care and repair thereof are a necessary part of the company's property as a common carrier, and a way to its car barns is a necessity as a common carrier. (Page 494.)
2. MUNICIPAL CORPORATIONS—STREETS—GRANT OF RIGHTS TO USE TO STREET RAILROAD. Where a spur track was necessary to enable an electric railway which was a common carrier to reach its car barns, the city council may authorize the laying of the tracks in the street, though it could not allow the building of tracks for a more private use.<sup>1</sup> (Page 494.)

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<sup>1</sup>*Cereghino v. O. S. L. R. Co.*, 26 Utah, 467, 73 Pac. 634, 99 Am. St. Rep. 843; *Stockdale v. Railroad*, 28 Utah, 201, 77 Pac. 849.

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Whitmeyer v. Salt Lake & O. Ry. Co., 46 Utah 491.

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Appeal from District Court, Second District; Hon. J. A. Howell, Judge.

Action by George A. Whitmeyer against the Salt Lake & Ogden Railway Company.

Judgment refusing an injunction. Plaintiff appeals.

AFFIRMED.

*C. R. Hollingsworth* for appellant.

*Boyd, De Vine & Eccles* for respondent.

STRAUP, C. J.

The defendant is a common carrier of passengers and freight operating an electric railway from Salt Lake City to Ogden. It was engaged in constructing and laying a spur track along or across a public street in Ogden running from its main line to its car barns. The plaintiff owns a lot with a building on it near the street. He brought this action to enjoin the defendant from occupying the street and from constructing and laying the track. The court refused the injunction, and the plaintiff appeals.

The court found:

That the defendant is a common carrier, and that the plaintiff owns property in Ogden abutting on the north side of Thirty-First street; "that on or about the 5th day of May, 1914, the defendant began constructing certain railroad tracks from a point on Lincoln avenue north of said Twenty-First street, across private lands to the north line of Thirty-First street, thence diagonally across said street to what is known as the car barns of the defendant to the south of such Thirty-First street; that the westerly side of the said tracks, at the street line, is about eight feet east of the easterly line of plaintiff's property; that it became and was necessary for the defendant company in doing so to tear up and remove earth from said street and the cement sidewalk at the point of crossing on the north side of said Thirty-First street, but that at the time of the issuing of the temporary injunction herein the

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Appeal from Second District.

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excavations in and obstruction of said street for travel was only temporary, and that it was and is the intention of the defendant to lay such tracks even with the grade of the street and of said sidewalk, and to restore such street and sidewalk to their formed grades; that such car barns or sheds are located upon and adjoining the main located lines of defendant, and are used in connection with, and as a part of, the business of the defendant company of carrying passengers and freight and for the maintenance, care, repair, and overhauling of its cars and electric locomotives used in such business, and said barns or sheds are located on certain lands owned by the defendant company immediately south of said Thirty-First street, as set forth in its answer herein; that the construction of such additional tracks is necessary and required for the convenient and economical handling of its cars and electric locomotives and the care and repair thereof in connection with its business as a common carrier of passengers and freight, and that the construction and proposed construction and use thereof is and will be in the usual and ordinary manner; that at the time of the commencement of the action herein the defendant had, and still has (in addition to the powers conferred upon it by the laws of the State of Utah), a franchise granted by Ogden City under date of the 12th day of June, 1905, and as amended to date the 2d of August, 1909, granting to it the right to construct a double-track, electric railroad into the City of Ogden, together with all necessary switches, Y's, turnouts, side tracks, and other trackage necessary in the operation of its line; and, further, that since the commencement of the action and prior to the hearing herein the board of commissioners of Ogden City regularly and duly passed an ordinance specifically granting a franchise to the defendant to construct the tracks in question upon and across said Thirty-First Street in the location and manner in which they are being constructed by the defendant."

On these the court denied the injunctive relief and dismissed the complaint. It is claimed that the court erred in finding that the car barns of the defendant were used as a part of its business in carrying passengers and freight. This

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is based on the ground "that the car barns are used by the defendant only for maintenance, care, repair, and overhauling of its cars and electric locomotives," and that 1, 2 they are not used in any manner "by the public in doing business with the defendant as a common carrier," and that "the public has no right to enter upon the premises used by the defendant in connection therewith." That the car barns are used by the defendant for the maintenance, care, and repair of its cars used in its business and in operating its road is not disputed. What is claimed is that the public has no right to be around the car barns, and that they are not used to take on or off passengers, or to load or unload freight, and for that reason it is contended that they are not used for a public purpose. We do not see anything to this. To say that a common carrier may condemn and occupy lands to construct and maintain a line of railroad, but not for necessary power houses, repair shops, etc., nor for switches and spur tracks to get to them, would be a most novel doctrine. That the defendant is a common carrier and as such employs and operates its line of railway is not disputed. That the car barns are used and that the track attempted to be constructed is intended to be used in connection with and as a part of its railroad business, and hence for a public use, and not for a mere private use, cannot be doubted. Then is it said that the plaintiff's property would be damaged by the occupancy and use of the street for railroad purposes. Nothing in such respect is shown to entitle the plaintiff to injunctive relief. The case does not come within the rule stated in *Cereghino v. O. S. L. R. Co.*, 26 Utah, 467, 73 Pac. 634, 99 Am. St. Rep. 843, nor that of *Stockdale v. Railroad*, 28 Utah, 201, 77 Pac. 849. The point made that private property was taken for mere private use has no foundation. For that reason the further point is also of no force that the municipality has no right to grant the right to construct a railroad upon or across a public street for a mere private use.

We do not see any merit to this appeal. Let the judgment be affirmed, with costs.

Such is the order.

FRICK and McCARTY, JJ, concur.

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Original Habeas Corpus Writs Granted.

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SAVILLE v. CORLESS, Sheriff.

PORIZKY v. SAME.

Nos. 2815, 2816. Decided July 20, 1915. (151 Pac. 51.)

1. **STATUTES—CONSTITUTIONAL PROVISIONS—SUBJECT AND TITLE OF ACT.** Laws 1915, c. 23, entitled "An act to regulate the working hours of all employees of mercantile establishments," providing by section 1 that all mercantile and commercial houses in cities of 10,000 population and over should close at six p. m. on every business day in the year except for the six business days preceding December 25th, by section 2 exempting all houses dealing mainly in provisions of a perishable nature which are regarded as public necessities, by section 3, exempting drug stores which are regarded as public necessities, violated the constitutional provision that the subject of an act shall be clearly expressed in its title, since instead of regulating the working hours of employees, the body of the act fixed a closing hour for mercantile and commercial houses, extending both to those having employees and those having none. (Page 496.)
2. **MASTER AND SERVANT—STATUTORY REGULATIONS—HOURS OF WORK AND CLOSING.** Such act was invalid as an exercise of the police power, since the men's furnishing and jewelry business conducted by one of the petitioners without help, and the retail cigar business of the other petitioner, did not affect the health or safety of those engaged in it, and since the act fixed a closing hour and was not directed to enterprises affecting the health, morals, safety, or general welfare. (Page 497.)
3. **STATUTES—SPECIAL LEGISLATION—OCCUPATION AND EMPLOYMENT.** Such act was objectionable as being special legislation, since it only applied to cities of 10,000 or more, and since it exempted drug stores and commercial houses dealing mainly in food stuffs and provisions of a perishable nature. (Page 498.)
4. **CONSTITUTIONAL LAW—PERSONAL RIGHTS—RIGHT TO ACQUIRE AND DISPOSE OF PROPERTY.** Such act violated the constitutional right to enjoy, acquire, and possess property, the most valuable of which is that of the right to sell. (Page 498.)

Original *habeas corpus* proceedings by Walter Saville and by William Porizky against John S. Corless, Sheriff of Salt Lake County.

Writs granted.

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Saville v. Corless—Porizky v. Same, 46 Utah 495.

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*Howat, Macmillan & Nebeker and James Ingebretsen* for plaintiff.

*H. L. Mulliner*, County Attorney, and *H. Van Dam, Jr.*, Assistant County Attorney, for defendant.

STRAUP, C. J.

The plaintiffs are held in custody by the defendant for alleged violations of chapter 23, Laws of Utah, 1915. They, on applications for a writ of *habeas corpus*, asked to be discharged on alleged grounds of invalidity of the act, that the subject of the act is not clearly expressed in the title, and that the act contravenes the fourteenth amendment to the Constitution of the United States, and the state Constitution, forbidding special legislaion where a general law can be made applicable.

The Constitution provides that the subject of acts shall be clearly expressed in the title. There is a subject expressed in this title. It is, "An act to regulate the 1 working hours of all employees of mercantile establishments." The act itself provides, section 1:

"That all mercantile and commercial houses, either whole-sale or retail, or both, in the cities of ten thousand population and over, shall close at six o'clock in the evening of every business day of the year, except for the period of six business days immediately preceding December 25, of each year."

Section 2:

"This act exempts all commercial and mercantile houses that deal exclusively in, or whose major portion of stock consists of foodstuffs, meats and other provisions of a perishable nature; which are regarded as, and are, public necessities."

Section 3:

"That this act also exempts drug stores, which are regarded as, and are, public necessities."

It is thus seen that the title of the act is to regulate the working hours of employees of mercantile establishments; but when we look to the body of the act, we find nothing concerning such a subject, but find one wholly different, a subject fixing a closing hour for mercantile and commercial houses.

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Original Habeas Corpus Writs Granted.

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The act itself forbids them to be open after six o'clock, regardless of the subject of employees or of their working hours. It just as much forbids one who has no employees from conducting his business, or keeping it open, after six o'clock, as one who has or conducts his business with employees. It makes the business itself unlawful after six o'clock. No such subject is expressed in the title.

The act is defended on the ground that it is a police measure and that as such it was competent for the Legislature to fix and regulate working hours of employees of mercantile and commercial houses and establishments. As has been seen, the act itself in no manner relates to such a 2 subject. If, however, that be the intent, then does the act contravene the fourteenth amendment to the Constitution of the United States. That very clearly is shown by the case of *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133. There, the State of New York forbade the employment of bakers longer than ten hours per day. The Supreme Court of the United States held the act bad, because it abridged the right to contract. The act there, as here, was defended as a police measure; but the court held that it in no manner related to public health, morals, safety, or general welfare, nor to the health, morals, or safety of those engaged in the business. One of the plaintiffs is a merchant engaged in selling men's clothing, furnishing goods, boots, shoes, jewelry, etc., in Salt Lake City. He conducted his business without help. The other plaintiff is engaged in selling cigars at retail in Salt Lake City. Both of them sold goods after six o'clock p. m. That, and that only, constitutes the alleged violation. It also is averred and admitted that commercial houses, or establishments in Salt Lake City, and in other cities of 10,000 or more population, and exempt under the act, deal in and sell, after six o'clock, the same kind of goods dealt in and sold by the plaintiffs after that hour. Whether the act be viewed as expressed in the title, or as indicated in the body of the act, we do not see how it can be defended as a police measure. The business conducted by the plaintiffs does not affect the health or safety of those engaged in it. Nor is the act directed to enterprises affecting health,



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morals, safety, or general welfare. It strikes at all commercial houses and establishments, not within the exemptions, and forbids them to be open after six o'clock, regardless of the character of the business carried on, and regardless of whether it does, or does not, affect health, or morals, or safety. It, therefore, cannot be upheld as a police measure.

We also think the act special legislation. It only applies to cities of 10,000 population or over. Business houses or commercial establishments in other cities and towns may keep open at all hours of the day or night, and sell anything not otherwise forbidden by law. The act further exempts drug stores, and commercial houses dealing exclusively 3 in, or whose major portion of stock consists of, food-stuffs, meats, and provisions of a perishable nature. Under the act, such establishments or houses can keep open and sell anything after six o'clock. That is, a hardware, jewelry, book, dry goods, clothing, or cigar store, and many other stores cannot keep open or sell anything after six o'clock. But a drug store, or a store whose major portion of stock is food-stuffs, can keep open after six o'clock, and sell anything not otherwise forbidden by law. Drug stores are not restricted after six o'clock to the sale of drugs merely, nor are food stores to food and provisions. They are privileged to sell, and under the admitted facts, do keep open and sell, after six o'clock, the same things the plaintiffs are forbidden to sell after that hour. Clearly that is special legislation, and the granting of privileges forbidden by the Constitution. We therefore think the act bad on all three grounds.

We think it also offends against constitutional rights to enjoy, acquire and possess property, the most valuable of which is that of alienation, the right to vend and sell. There are things the sale of which may be restricted, 4 regulated, or even prohibited by the Legislature, and enterprises which may be restricted, regulated and controlled. But such legal interference must rest on the police power of the state to promote or preserve public health, public morals, public safety, public convenience, and general welfare. The act here has no such purpose, and in no sense tends to promote or preserve public health, morals, peace, order, safety, con-

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Original Habeas Corpus Writs Granted.

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venience, comfort, or welfare. It is but an arbitrary and an unwarranted interference with a merchant's business. One or a number of merchants may desire to close their stores at six o'clock. They may do that. But they, by legislation, cannot compel every other merchant to close at the same hour. They can run their own business, but not their neighbor's. So employees, for motives of their own, may desire all stores to close at a certain hour. But their employers, whose business and property is affected, have a voice in that. They, if they choose, may consent to close. But they cannot, by legislation or otherwise, be coerced to do so. An employee may refuse to work for another after six o'clock. That is his right. But he may not, by legislation or otherwise, prevent his employer from conducting his own business in person, or with other employees who are willing to work for him. That is an unwarranted interference with the rights of others. All this is so self-evident and fundamental as not to admit of argument. Most sweeping amendments to both the federal and state Constitutions are essential to sanction such legislation as indicated in either the title or body of the act before us. If there be one thing more than others to be guarded against encroachment it is the federal and state Constitutions. These we are all sworn to protect and defend. To disobey them is to jeopardize fundamental rights and liberties of the people, imperil their welfare and happiness, and to menace the very existence of governments.

The writs are granted, and the plaintiffs permitted to go without day.

FRICK and McCARTY, JJ, concur.

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Salt Lake & U. R. Co. v. Abbott et al., 46 Utah 500.

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## SALT LAKE &amp; U. R. CO. v. ABBOTT, et al.

No. 2738. Decided July 20, 1915. (150 Pac. 967.)

1. **WITNESSES—CREDIBILITY—CROSS-EXAMINATION—INTEREST.** In an action to condemn land for a railroad right of way, plaintiff, on cross-examination of defendants' witness, and as affecting the credibility of the witness, could inquire whether witness and other interested landowners had met and agreed to demand of the road a certain amount as damages for lands taken and damaged. (Page 501.)
2. **WITNESSES—CREDIBILITY—EXAMINATION.** In an action to condemn land for a railroad right of way, wherein plaintiff claimed that witnesses for defendants were present at a meeting of owners who agreed to demand a certain amount as damages, questions to a witness for plaintiff as to who executed the vouchers in settlement made for lands, whether there had been a settlement with or a purchase from an owner not a party to the action, and as to what property in the vicinity of defendants' property had not been purchased for the right of way, did not show on their face any connection with the fact that certain of the witnesses for defendant were defendants in other similar cases, as bearing on their credibility, and were properly excluded. (Page 501.)
3. **EMINENT DOMAIN—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.** In such action error, if any, in excluding the cross-examination of defendants' witness as to his relation to a defendant in another action, was not prejudicial, where it was otherwise shown that the witnesses for defendants were landowners along or near the right of way, and were indirectly interested in the location. (Page 502.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action to condemn lands by the Salt Lake & Utah Railroad Company against Charles L. Abbott and others.

Judgment of condemnation and assessment of damages.  
Plaintiff appeals.

**AFFIRMED.**

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Appeal from Third District.

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*Henry I. Moore and Warner & Maginnis, for appellant.*

*Thurman, Wedgwood & Irvine, for respondent.*

STRAUP, C. J.

The plaintiff brought this action to condemn lands for a right of way. The court granted the condemnation. The jury assessed the damages, from which portion of the judgment the plaintiff appeals.

It is contended that the plaintiff, on cross-examination of one of the defendants' witnesses, was not permitted to take an answer from him as to whether he and other interested landowners had met and agreed to demand of the plaintiff a certain amount as damages for lands taken and damaged. As affecting the credibility of the witness and the weight of his testimony the plaintiff had the right to inquire into such matter. But we think the record discloses that it was permitted to fully go into that.

An officer of the plaintiff was called as a witness for the plaintiff. The plaintiff asked him:

"Q. When land has been purchased and settlement made for the lands, who executes the vouchers in those settlements?"

"Q. Do you know whether or not a settlement for the right of way, or the purchase of a right of way, has been obtained from Joseph Hibbard (a person not a party to the action)?" "Q. What property in the vicinity of the Abbott property do you know of that the railroad company has not yet purchased for its right of way?"

Objections from the defendants were sustained. It is claimed the questions were asked to show that witnesses testifying for the defendants were present at one of the meetings referred to, and that they were defendants in other actions. Of course, as bearing on the credibility of the witnesses and the weight to be given their testimony, it was proper to show that they were defendants in other actions, or otherwise were, either directly or indirectly, interested in the litigation. But it does not appear in what way the questions propounded tended to show that.

A witness named Gardner testified for the defendants. On

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cross-examination he was asked: "What relation are you to Jane Gardner?" An objection to that was sustained. The plaintiff claimed that Jane Gardner was a defendant in another action, and thus claimed the right to show 3 what relation the witness was to that person. It might be proper enough to have permitted the witness to answer, but we cannot say that the court's refusal prejudiced the plaintiff in any substantial right. It otherwise was shown that the witnesses for the defendants were landowners along, or near, the right of way, lived in that vicinity, and indirectly were interested in the litigation. To have taken answers to the particular questions would not have added anything, for all that was claimed by them was otherwise indisputably shown.

Let the judgment be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ, concur.

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FOWKES v. J. I. CASE THRESHING MACH. CO., et al.

No. 2719. Decided July 30, 1915. (151 Pac. 53.)

1. HIGHWAYS—REGULATION—SPEED OF AUTOMOBILE. Although Laws 1909, c. 113 (Laws 1911, c. 131), make it lawful to operate an automobile along a country road at a speed of twenty miles an hour, operating an automobile at a less speed may, under some circumstances, constitute negligence.<sup>1</sup> (Page 509.)
2. HIGHWAYS—ACTION FOR INJURIES—EVIDENCE—SPEED OF AUTOMOBILE. In an action for injuries to plaintiff while riding on a highway on a load of hay caused by defendant's automobile striking the horses and causing them to run away, evidence held insufficient to support a finding that the automobile was operated at a negligent and excessive speed. (Page 509.)
3. HIGHWAYS—ACTION FOR INJURIES—EVIDENCE—SUFFICIENCY. In an action for injuries to plaintiff, while riding on a highway, in a runaway caused by defendant's automobile, evidence held insufficient to support a finding that plaintiff's horse was struck by the automobile. (Page 510.)

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<sup>1</sup>Lockhead v. Jensen, 42 Utah 99, 129 Pac. 347.

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Appeal from Fifth District.

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4. **HIGHWAYS—ACTIONS—EVIDENCE—SUFFICIENCY—WARNING.** In an action for injuries to plaintiff in a runaway caused by defendant's automobile passing him on the highway, evidence *held* sufficient to show that defendant failed to sound the horn of the automobile, as required by statute. (Page 511.)
5. **HIGHWAYS—ACTIONS—EVIDENCE—SUFFICIENCY—LAW OF ROAD.** In an action for injuries to plaintiff in a runaway caused by defendant's automobile, evidence *held* to sustain a finding that the automobile passed plaintiff on the wrong side. (Page 511.)
6. **APPEAL AND ERROR—REVERSAL—GROUNDS—FINDINGS NOT SUPPORTED BY EVIDENCE.** In action for personal injuries due to a collision between a wagon upon which plaintiff was riding and defendant's automobile on a highway, where the court submitted several issues of negligence to the jury, a judgment for plaintiff will be reversed where several of the findings were not supported by evidence. (Page 511.)
7. **MASTER AND SERVANT—LIABILITY FOR ACTS OF SERVANT—PERSONAL INJURIES—SCOPE OF EMPLOYMENT.** In an action for injuries to plaintiff in a runaway caused by an automobile, evidence on the issue whether the driver of the automobile was acting within the scope of his employment as defendant's servant *held* to require the direction of a verdict for defendant. (Page 511.)

Appeal from District Court, Fifth District; *Hon. Joshua Greenwood*, Judge.

Action by John Fowkes against the J. I. Case Threshing Machine Company and another.

Judgment for plaintiff. Defendants appeal.

REVERSED and remanded.

*C. S. Varian*, for appellant.

*J. H. McKnight*, for respondent.

APPELLANT'S POINTS.

The master is not liable for injuries occasioned to a third person by the negligence of his servant, while the latter is engaged in some act beyond the scope of his employment, for his own purpose, or for the *purpose of another*, although he may be using the instrumentalities furnished him by the

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Fowkes v. J. I. Case Threshing Mach. Co. et al., 46 Utah 502.

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master with which to perform the ordinary duties of his employment. (*Slater v. Advance Thresher Co.*, 97 Minn. 305; 107 N. W. 133; *Morier v. R. R. Co.*, 31 Minn. 351; 17 N. W. 952.)

The phrase, "in the course (scope) of his employment," is not used synonymously with "during the period of his employment." If it were otherwise, the master would be liable for all of the tortuous acts of his servant during the period of service. (Cases last cited.) The test must always be, was the servant acting within the scope or course of the employment at the time of the acts complained of, and, therefore, it would seem to follow, as said by an English court, "that a servant can only be acting within the employment of the master so long as he is doing some act with his master's assent." (*Storey v. Asnton*, 38 L. J. Q. B. 223.)

A master has the right to select and choose his agents, and to determine himself, and to assign to the servants so selected, their respective duties, and no assumption by an employee of duties not assigned to him will bring those duties within the course or scope of his employment *as defined by the master*, and when an act is not within the scope of a servant's employment, it can not be within either the express or implied authorization of the master. (*Lima Co. v. Little*, 67 Oh. St. 91; 65 N. E. 861-864.)

#### STRAUP, C. J.

The plaintiff brought this action to recover damages for alleged personal injuries. He had judgment against both defendants. They separately appeal. The accident occurred near Mona, Juab County, Utah, on a highway, where the plaintiff was driving a team of horses and wagon, and where the defendant Roberts passed him in an automobile. The alleged negligence is that Roberts, before attempting to pass the plaintiff, failed to sound the horn of the automobile, traveled at an excessive and negligent speed, "about twenty miles an hour," passed the plaintiff on the wrong side, and, in passing, struck one of plaintiff's horses with the automobile, by reason of which the plaintiff's team became frightened and unmanageable, ran away, threw the plaintiff off the wagon

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Appeal from Fifth District.

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and injured him. It further is alleged that Roberts was an agent and servant of the other defendant, the Case Company, and, as such, at the time of the injury, was in the course of his employment, driving the automobile for it. The contention made by Roberts is that the evidence is insufficient to establish the alleged negligence and that error was committed in the charge to the jury. The same contentions are made by the Case Company, and, in addition, that the proof fails to show that it was responsible for Roberts' acts in driving and operating the automobile.

The plaintiff had a small load of hay on the wagon and was traveling south. The highway was raised in the center and sloped on either side to a ditch. It was about 150 feet wide; the traveled portion of it about twenty feet wide. The plaintiff was seated on the hay on the front part of the wagon, and, as he testified, was driving along about the center of the road. He did not hear the automobile horn sounded, and had no knowledge of the presence of the automobile until in passing him on the right, or west, side it was about even with the horses. His team became frightened, the off horse lunging and crowding towards the other horse, and became unmanageable and ran away, throwing the plaintiff out and injuring him. Two other witnesses for the plaintiff, two boys, testified that they were loading brush in a field about seventy feet from the road and about seventy-five yards from the place of the accident. They saw the automobile approach, heard no "toot of the horn," saw it pass the plaintiff on the right, or west, side, and that it was driven by Roberts, with whom was a woman companion, saw the team frightened and run away, the plaintiff thrown out, and the automobile pass on without stopping. One of them testified that the speed of the automobile, as it passed the plaintiff was not slackened. When asked how fast it went, he answered, "About like they always go." Another witness for the plaintiff testified that he saw the automobile pass his place about a quarter of a mile south of the place of the accident. He was asked by plaintiff's counsel: "How fast was the auto traveling then as compared with the speed of a train?" He answered: "It was traveling much faster than a passenger train generally travels passing



our place." On cross-examination he was asked and he answered:

"Q. And you say the auto was going faster than a railroad train? A. In my judgment. Q. How fast does the railroad train go that you measure by? A. I don't know. I don't know the time of the train. Q. Only you think it was faster than a railroad train? A. Yes, sir; it would be going faster. Q. Is there a station at Mona? A. Yes, sir. (About three miles by wagon road to his house, but the train passed his house within a half mile.) Q. Of course, you don't know how fast the automobile was traveling when it came up behind the wagon? A. No, sir. Q. You don't know that? A. No, sir. Q. It was a quarter of a mile away when you think it was going faster than a railroad train, and you don't know how fast a railroad train runs, do you? A. I don't know."

On redirect he was asked and he answered:

"Q. Now as to the speed the train travels—did you ever ride on a train from Mona here (Nephi), or here to Mona? A. Yes, sir. Q. How far is it from here to Mona? A. Seven and a half miles. Q. How long does it take a train to travel that? A. About ten or twelve minutes, I guess. Q. Not more than fifteen minutes? A. Not more than fifteen minutes. Q. When you were thinking about the speed of a train, that is the speed you were thinking? A. Yes, sir. Q. When the train travels between here and Mona? A. Yes, sir."

That is all the proof on the part of the plaintiff to show the speed of the automobile at the time of the injury. This witness also testified that as soon as the automobile had passed him he went back to the place of the accident and there saw where the automobile had passed the plaintiff's team and wagon; that the automobile tracks came back into the road about ten feet from where the wagon tracks had left the road; that the distance between the automobile track and the wagon track where the latter left the road was about three feet; that the nearest horse track at that place to the automobile track was about five inches; and that the fender of the automobile extended about five inches over the wheel of the automobile. That was all the evidence to show that the automobile struck one of plaintiff's horses.

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Appeal from Fifth District.

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The Case Company, a corporation of Racine, Wis., was engaged in manufacturing and selling threshing machines and automobiles. It had a local agent or dealer at Oasis, Millard County, a railroad station about ninety-two miles south of the place of the accident, and about 170 miles south of Salt Lake City. His name is Huff. Roberts was a salesman of the Case Company. He lived at Grantsville, Utah, a town about twenty miles west of Salt Lake City. The character of his employment was evidenced by a written contract between him and the Case Company. The material parts of it are: The Case Company "does hereby engage the services" of Roberts, "as a salesman, expert and collector," for a stated time and at a stated monthly salary, "and actual traveling expenses when absent from home"; Roberts "to devote his whole time and attention to the services of" the Case Company "as salesman, expert and collector or in any other capacity in which" the Case Company "might require his services." A Case automobile was sold to one Morgan, residing at Oasis. He purchased it from Huff, for \$1,272. He, however, gave Huff his check for \$1,625 and about \$75 in cash for extras. Huff threw off his commission and paid back to Morgan the difference between \$1,625 and \$1,272. One of the Case Company's printed automobile "order blanks" was filled out. So far as material, the order is:

"Automobile Order Blank.

"Oasis, Utah, April 12, 1913.

"J. I. Case T. M. Company, Racine, Wisconsin: You will please ship or deliver on or before the 15 day of April, 1913 (or as soon thereafter as you can furnish for transportation or delivery), to Salt Lake (name of railway station), or other convenient station in the state of Utah, in care of J. I. Case T. M. Co. (dealer or company), one Case 30 H touring automobile to be equipped," etc., and "for which I agree to pay the sum of \$1,272.00 and freight charges thereon from the factory. I hand you herewith \$1,272." as the purchase price.

After further provisions, the order recites:

"We are not responsible to the purchaser of our goods for any undertakings, promises or warranties made by our representatives, beyond those expressed herein. \* \* \* Our

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responsibility ceases when we deliver cars to a railroad company and have its receipt for them in good order."

The order contains further provisions not here material. It is signed, not by Morgan, but by Huff as the purchaser. It also is signed at the bottom by Roberts, in print, "I assisted in taking this order and witnessed all signatures," then his name, "E. H. Roberts," in writing, after which, in print, "signature of salesman." Morgan did not sign the order, nor does his name in any manner appear in it. It, on its face, purports to be a direct contract of purchase by Huff from the Case Company. On the back of the order is endorsed: "For account of Henry Huff, at Oasis, state of Utah." "Order of Henry Huff." "Order receive at Office in Racine, June 2, 1913." "Accepted June 9th, 1913." "Checked June 27, 1913." Morgan testified that Huff sold him the automobile, and that he paid him the money, but that he made the "agreement jointly with both" Huff and Roberts, and that both were present when the order was signed. He further testified that, when the order was signed, it was agreed between them that the automobile was to be delivered to him at Oasis, and that, as Roberts "was going to Salt Lake anyhow, he would bring the car down when he came back."

Roberts testified that he drove the automobile from Salt Lake to Oasis. Where, or from whom he got the car, is not shown. He got it on the 17th or 18th of April. The accident occurred on the 19th, nearly two months before the order was received by the Case Company, and more than two months before the automobile was checked out. He drove from Salt Lake to Provo. There he took with him an agent of a lumber company and a salesman of the Case Company. He left them at Springville. From there he took with him to Oasis a lady corset canvasser. She accompanied him all the way, and was with him at the time of the accident. Roberts, on the way, but not on his direct route, visited Scipio and Holden, small settlements, where he did some soliciting for threshing machines and automobiles. His version of the accident and that of his companion is this: When they, on the highway, overtook the plaintiff, they were traveling about fifteen or seventeen miles an hour. Roberts sounded the automobile horn

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several times. He disengaged the clutch, applied the brake, and slowed down. The plaintiff drew his team to the left, as Roberts thought, to let him pass on the right side, and for that reason passed the plaintiff on that side. In passing him, he slowed down to about ten miles an hour. When the automobile was even with the team, the horses became frightened, the off horse plunging and crowding toward the other horse. Roberts accelerated the speed to about twelve or thirteen miles an hour in order to pass and to get away from the team. After he had passed a short distance, he looked back, saw the team run, and, seeing a man running after it, believed it was the plaintiff and thought no one was hurt. Both testified that the automobile did not strike the plaintiff's horse. Roberts further testified that, because of the slope of the road at the place where he passed the plaintiff, it would have been impossible to operate the automobile at twenty miles an hour without upsetting it or skidding across the road. He delivered the automobile in good condition and without blemish to Morgan on the 22d of April.

The court submitted the case to the jury on all the alleged acts of negligence, the alleged excessive and negligent speed, striking the plaintiff's horse, passing him on the wrong side, and failing to sound the horn of the automobile. We do not find sufficient evidence to support the first two. 1, 2 Under the statute (Laws 1909, c. 113; Laws 1911, c. 131) it was lawful to operate an automobile along such a place as where the accident occurred at twenty miles an hour. True, operating an automobile at a speed less than that prescribed by statute may, nevertheless, under given circumstances, be negligent. *Lockhead v. Jensen*, 42 Utah, 99, 129 Pac. 347. But the plaintiff's proof does not show at what speed the automobile was operated, and hence it was not shown that it was operated at an excessive or negligent speed. The testimony of the boy that it went "about like they always go" does not indicate anything, unless it be assumed, which cannot be done, that automobiles are always operated at an excessive and negligent speed. Then there is the testimony of the other witness who saw the automobile pass about a quarter of a mile south of the place of the accident. Assuming

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that the speed of an automobile a quarter of a mile from the place of the accident is some evidence as to its speed at the place of the accident—which is doubtful, Huddy on Automobiles (3d Ed.) Section 181—still such evidence has little, if any, weight or relevancy as against direct evidence showing the speed at the place of the accident, unless it be shown that the speed between the two places was not materially diminished or accelerated. No doubt a lay witness, experienced with, or accustomed to observe, moving objects, may give his opinion as to the speed of an automobile. Sufficient was shown to qualify the witness to give such an opinion. He, however, was not asked for it, nor did he express any. He, in a way, compared the speed of the automobile with the speed of trains he saw passing his place. But when asked, on cross-examination, how fast the trains ran, he said he did not know. On redirect he stated that he thought of a speed at which trains ran from Mona to Nephi, a distance of seven and one-half miles, in about fifteen minutes. From that it is argued that the trains he saw passing ran thirty miles an hour, and that the automobile went faster than that. To support the argument must it be assumed without proof that trains passing his place ran at the average speed between Nephi and Mona. If the witness had a reliable opinion as to the speed of the automobile, it ought not to have been difficult to have stated it. While his testimony was not necessarily irrelevant or incompetent because he could not, and did not, state the speed in miles per hour, yet, when he undertook to testify to a relative or comparative speed, the standard of rapidity with which he attempted to make the comparison ought itself to have had a reasonable degree of certainty. The testimony leaves the standard to mere argument. On that is based the speed of the automobile—one inference on another. We think it insufficient to prove the alleged negligent speed. The defendants' evidence was that the automobile, in passing plaintiff, was operated at but ten miles an hour. Plaintiff's case in such particular was therefore not strengthened by the defendant's evidence.

We have already referred to the evidence offered to support the allegations that plaintiff's horse was struck

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by the automobile. We think it insufficient to support it. Both of these allegations of negligence ought to have been withheld.

We think there is sufficient evidence to support the allegations that Roberts failed to sound the horn of the automobile and that he passed the plaintiff on the wrong side. The statute requires one operating an automobile to sound the horn of the automobile within fifty and not to exceed one hundred yards distant from any person driving a 4, 5, 6 vehicle drawn by horses, which the motor vehicle may meet or overtake, and, in passing him, to pass on the left side. There is evidence to show that the horn was not sounded. The evidence also shows that the automobile passed the plaintiff on the right side. True, Roberts testified that the plaintiff drew his team to the left, indicating a desire to let the automobile pass on the right side; but that is disputed. Since, however, the court submitted the case on all of the alleged negligence, the judgment, even as to Roberts, must be reversed, for it cannot be told whether the verdict is founded on but one, or on all, of the alleged acts of negligence.

We think the case was wrongfully submitted to the jury as to the Case Company, for it was not sufficiently shown that Roberts, in driving the automobile at the time of the accident, was discharging any duty, or transacting 7 any business, or doing anything, for the Case Company. The New Hampshire court, in *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670, said that:

"The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of."

The Texas court, in *International & G. N. Ry. Co. v. Cooper*, 88 Tex. 608, 32 S. W. 517, that, to render the master liable, the act causing the injury "must be done in furtherance of the master's business and for the accomplishment of the object for which the servant is employed."

Other authorities, that:

"The universal test of the master's liability is whether there was

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authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment?" *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598.

All we have to determine the scope of Roberts' employment and as to whether what he did was in furtherance of the Case Company's business, or for the accomplishment of an object for which he was employed, is the contract between him and the Case Company. From that it cannot be inferred or implied that Roberts was employed or was required, in the course of his employment, to deliver automobiles sold by him or in which he assisted in taking orders, by driving them through the country as here was done. Morgan, to whom he delivered the automobile, was a stranger to the Case Company. Huff, and not he, purchased the automobile from it. The Case Company agreed with Huff, not with Morgan, to deliver the automobile at Salt Lake City, not Oasis. Huff ordered the automobile on the 12th of April. The order was received on June 2d; but on the 17th or 18th of April Roberts procured a Case automobile, answering the description of the automobile described in the order, from some one in Salt Lake. Though it be inferred that it was from a dealer—there is no proof as to that—yet there is no proof to show the relation between such person and the Case Company. Certain it is that there is no proof to show that Roberts got the automobile from the Case Company, or that it, or any one on its behalf, intrusted the automobile to him for delivery. It is not made to appear that Roberts ever before made delivery of automobiles, or that he had any duties to perform in such respect. The Case Company did not obligate itself to deliver the automobile at Oasis, but Salt Lake City. The matter may be put thus: Huff ordered and purchased an automobile, not as an agent or dealer, but as a purchaser, from the Case Company, upon an agreement that the automobile be delivered at Salt Lake City. Huff sold the automobile to Morgan and agreed to deliver it to him at Oasis. Roberts, with Huff and Morgan, agreed to go to Salt Lake City and drive the automobile to Oasis. It not appearing that Roberts was employed to perform any such duties by the Case Company, or that the

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company was required to deliver the automobile at Oasis, or that it had intrusted the delivery of it to Roberts, there is not anything to support a finding that Roberts, in making the delivery, was then doing anything for the Case Company, or doing anything within the scope or course of his employment. The court hence ought to have directed a verdict in favor of the company.

For these reasons, the judgment of the court below is reversed, and the case remanded for a new trial. Costs to the appellants.

FRICK and McCARTY, JJ., concur.

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BEAN v. FAIRBANKS, et al.

No. 2762. Decided July 30, 1915. (151 Pac. 338.)

1. APPEAL AND ERROR—RECORD—ABSTRACT AND ASSIGNMENTS OF ERROR—SERVICE AND FILING. Appellant's failure to file an amended abstract and assignments of error within the time allowed, though they had been served within such time, was not jurisdictional, and, where appellee was not thereby prejudiced, the appeal would not be dismissed therefor. (Page 516.)
2. TAXATION—TAX DEED—ACTION—BURDEN OF PROOF. Notwithstanding Comp. Laws 1907, section 2629, providing that tax deeds issued by the county auditor shall recite substantially the amount of the tax for which the property was sold, the year for which it was assessed, the day and year of sale, the amount for which the real estate was sold, a full description of the property, the name of the purchaser, and that when attested by the county auditor they shall be *prima facie* evidence of the facts recited therein, one claiming and asserting a tax title against the owner must allege all facts essential to the validity of the tax deed; and hence a plea in an action to quiet title, alleging that the property had been sold for taxes, that it had not been redeemed, and that a tax deed was issued to the purchaser, without attaching or referring to the recitals of the tax deed itself, was insufficient as a plea of tax title.<sup>1</sup> (Page 516.)

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<sup>1</sup>*Eastman v. Garrey*, 15 Utah, 410, 49 Pac. 310; *Olsen v. Bagley*, 10 Utah, 492, 37 Pac. 739; *Asper v. Moon*, 24 Utah, 241, 67 Pac. 409.



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Bean v. Fairbanks et al., 46 Utah 513.

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3. **TAXATION—TAX TITLE—ACTION—PLEADING AND REPLY.** In such action, a reply, not particularly averring the grounds on which plaintiff claimed that the tax sale and deed were invalid, was sufficient, since any reply was good enough to meet defendants' imperfect and insufficient plea of tax title; and the averment in the reply that the tax sale and purchase "was not in accordance with law, but was contrary to law," in the absence of a special demurrer or a motion to make more specific, was sufficient. (Page 516.)

Appeal from District Court, Sixth District; *Hon. Jos. H. Erickson*, Judge.

Action by Minnie S. Bean against Joseph W. Fairbanks, Estella Fairbanks and K. E. Roberts.

Judgment for defendant Roberts. Plaintiff appeals.

REVERSED, and case remanded, with directions to grant a new trial, and, on proper application, to permit the pleadings to be amended.

*G. T. Bean* and *C. E. Norton*, for appellant.

*E. E. Hoffman*, for respondents.

STRAUP, C. J.

The plaintiff brought this action to quiet title. She alleged generally that she was the owner of the real estate and that the defendants claim, but have no right to it; and demanded that they be required to set forth their claim, that it be adjudged groundless, and that the title be quieted in her. The defendants denied her ownership, and alleged title in themselves by adverse possession and by tax sale and deed. Their tax title is pleaded thus:

"That on the 21st day of April, A. D. 1908, the treasurer of the County of Sevier, State of Utah, sold to the defendant Joseph W. Fairbanks the land described in plaintiff's complaint for taxes which had been assessed against said land in the name of said G. T. Bean, and that on the 10th day of September, A. D. 1912, the said land not having been re-

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deemed for taxes, the county auditor of said County of Sevier, State of Utah, made, executed, and delivered to the defendant Joseph W. Fairbanks an auditor's deed, conveying the said land to the said Joseph W. Fairbanks, and that thereafter, to wit, on the 16th day of November, 1912, these defendants conveyed the said land to K. E. Roberts, who is now the owner and in the possession thereof."

The plaintiff, in reply, denied generally the defendant's title, both as to adverse possession and tax sale and deed, and, in addition, and with respect to the alleged tax title, that:

"Plaintiff further denies that defendants, or either of them, purchased said property at a tax sale, as alleged in their said answer, by which they acquired any legal title to said property, and plaintiff alleges that if any sale or purchase was made as alleged by defendants, the same was not in accordance with, but was contrary to, law and void."

On these issues the case was tried to the court. The plaintiff showed record title in one George T. Bean and a conveyance from him to her, and rested. The defendants, to support the issues on their behalf, gave evidence respecting their title, and, to support their alleged tax title, put in evidence a tax deed, executed and delivered by the county auditor on the 10th day of September, 1912, to the defendant Fairbanks, showed a conveyance by him and his wife to the defendant Roberts, and rested. The plaintiff then attempted to put in evidence to show the invalidity of the tax sale and deed. The court, on the defendants' objections, forbade that, on the ground that the plaintiff had not alleged the particulars in which she claimed the tax sale or deed was invalid. The court found that prior to the 21st of April, 1908, George T. Bean was the owner of the property, that on that day the county treasurer, for taxes, sold it to the defendant Fairbanks, and that thereafter the county auditor executed and delivered a tax deed to him, and that he and his wife conveyed to Roberts. The court found against the defendants on the issue of an adverse holding. Based solely on the tax title, the court rendered judgment in favor of Roberts quieting the title in him. The plaintiff appeals.

A motion was made at the last February term to dismiss

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the appeal on the ground of an incomplete abstract and of an insufficient assignment of errors. We, on March 1st, denied the motion, but gave the plaintiff leave, within ten days, to file an amended abstract and assignment of errors. The amended abstract and assignment were served, but were not filed, within that time. When they, after **1** service, were tendered for filing, the clerk refused to accept and file them because they were not tendered in time. On the 25th of March, the motion to dismiss the appeal was renewed. The reason given why the amended abstract and assignment, though served, were not filed within time is that the plaintiff has one counsel at Richfield and one at Salt Lake City. Each, so it is made to appear by affidavit, relied on the other to file and print. Each believed the other had done that. Neither did it within time. The plaintiff, of course, could not complain if we should dismiss the appeal for failure to comply with the order. Were the matter jurisdictional, the appeal ought to be dismissed; but it is not jurisdictional. Again; were the defendants prejudiced because the amended abstract and assignment, though served, were not filed within time, then, also, would we be inclined to now dismiss the appeal because of the Alphonse-Gaston behavior and neglect of plaintiff's counsel. But since the service was within time, and since the matter is not jurisdictional, and since the defendants were not prejudiced, we are not disposed to dismiss the appeal. The renewed motion, therefore, is denied, and the amended abstract and assignment of error directed to be filed as of the day when they ought to have been filed.

The assignment presents the ruling refusing the plaintiff to assail the tax proceedings and tax sale and deed. The ruling was made on the theory that the plaintiff had not, in her reply, averred with sufficient particularity the grounds on which she claimed the tax sale and deed were invalid. The defendants could have averred ownership in general terms, and then, to support the allegation, could have made proof of a tax title. In such case the plaintiff under a general denial and without specific averments, could have met **2, 3** that proof by evidence that the tax sale or deed was invalid, or could have shown any fact tending to overcome

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Appeal from Sixth District.

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the defendant's proof and to defeat their title. *Eastman v. Gurrey*, 15 Utah, 410, 49 Pac. 310. But the defendants did not plead ownership in general terms. It is claimed that they specially pleaded a tax title, and that in such case, to raise an issue as to irregularities or the invalidity of any of the proceedings resulting in the tax sale or deed, or in the sale or deed itself, the plaintiff was required to specifically aver the particulars thereof, and that she could not make such proof under a general denial. It is unnecessary to decide that, for any kind of a reply was good enough to meet the defendants' imperfect and insufficient plea of tax title. Under the common law, to establish a tax title, it was necessary to show that every material requirement, from listing the land to delivery of the deed, had been strictly complied with, and hence that the burden of proof, as between the owner and the purchaser, was upon the tax purchaser to show a strict compliance with all the provisions of law in relation to the proceedings on which the tax title was based. Because of the statute it is claimed that the burden in such respect has been shifted. The statute (Comp. Laws 1907, Section 2629) provides that tax deeds issued by the county auditor "shall recite substantially the amount of the tax for which the property was sold, the year for which it was assessed, the day and year of sale, the amount for which the real estate was sold, a full description of the property, and the name of the purchaser or assignee; and when attested by the county auditor shall be *prima facie* evidence of the facts recited therein."

Notwithstanding such provision, the authorities are to the effect that one claiming and asserting a tax title against the owner is nevertheless required to allege all the facts essential to the validity of a tax deed. *Gage v. Harbert*, 145 Ill. 530, 32 N. E. 543; *Skelton v. Sharp*, 161 Ind. 383, 67 N. E. 535; *Durrett v. Stewart*, 88 Ky. 665, 11 S. W. 773; Black on Tax Titles, 2d Ed. sec. 462. That is, when one relies on a tax title he must show in his pleading that each step, required by law to be taken to subject the property to taxation and to constitute a valid sale of it for taxes, has been complied with. To that effect also are the decisions of this court. *Olsen v. Bagley*, 10 Utah, 492, 37 Pac. 739; *Eastman v. Gurrey*,

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*supra*; *Asper v. Moon*, 24 Utah, 241, 67 Pac. 409. Now it may be that, had the defendants attached to their pleadings a copy of the tax deed itself, containing recitals of all requisite proceedings to have been taken and which were essential to a valid sale and deed, or in such particular averred the substantive terms of the deed, the pleading might have been sufficient. *Smith v. Denny*, 90 Miss. 434, 43 South. 479. But the defendants did not do that. They, by their pleadings, neither attached nor exhibited the tax deed, nor averred any terms of such a deed. They, in the most general terms, but alleged that the property was sold for taxes assessed against it; that it was not redeemed, and that a tax deed was issued to the purchaser. That neither by reference or otherwise is alleging what the authorities teach, that whenever a tax title is specifically set forth and asserted against the owner in a direct proceeding it is necessary that every fact be averred requisite to show that each of the statutory provisions had been complied with. 37 Cyc. 1513, and cases. Thus, as against the defendants' plea of tax title, any kind of a reply was good.

Further, the plaintiff, in her reply, averred that the tax sale and purchase "was not in accordance with law, but was contrary to law." That, of course, was a most general averment; but in the absence of a special demurrer or a motion to make more specific, was sufficient. *Snell v. Dubuque*, 88 Iowa, 442, 55 N. W. 310; *Sanders v. Parshall*, 67 Hun., 105, 22 N. Y. Supp. 20, affirmed 142 N. Y. 679, 37 N. E. 825. Especially is that true in view of the defendants' bad plea of tax title.

The court, after admitting the tax deed evidence, ought not to have shut the door on plaintiff and prevented her from showing that the tax deed or sale was invalid, or that some one or more provisions of the law essential to the validity of the deed had not been complied with.

The judgment is therefore reversed and the case remanded with directions to grant a new trial, and, on proper application, to permit the pleadings to be amended. Costs to appellants.

FRICK and McCARTY, JJ., concur.

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Appeal from Third District.

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## CANDLAND v. MELLEN.

No. 2734. Decided July 30, 1915. (151 Pac. 341.)

1. **APPEAL AND ERROR—NOTICE OF APPEAL—SUFFICIENCY.** Where judgment was rendered and entered April 30, 1914, and a motion for a new trial was overruled on May 9th, whereby the judgment became final, a notice of appeal reading, "The defendant does hereby appeal from the verdict and judgment entered on the verdict in the above-entitled cause on or about the 30th day of April, 1914, and from the order overruling a motion for a new trial, made and entered on the 9th day of May, 1914, and from the whole thereof," sufficiently identified and described the judgment appealed from; the statement of an appeal from the order overruling the motion for a new trial not affecting the statement that the appeal was taken from the judgment. (Page 522.)
2. **APPEAL AND ERROR—DECISIONS REVIEWABLE—MOTION FOR NEW TRIAL.** No appeal lies from an order overruling a motion for a new trial. (Page 522.)
3. **APPEAL AND ERROR—DECISIONS APPEALABLE—FINAL JUDGMENT.** An appeal lies only from a final judgment entered in the cause. (Page 522.)
4. **EXCEPTIONS, BILL OF—TIME FOR FILING—EXTENSIONS OF TIME.** Where a judgment against defendant became final on May 9th, an order on May 27th, granting him sixty days to serve and file a bill of exceptions, meant sixty days from the date the order was made, so that an order made July 19th extending the time to serve and file a bill was within the time first granted. (Page 522.)
5. **EXCEPTIONS, BILL OF—TIME FOR SERVICE SUSPENSION.** On the death of the plaintiff after judgment in her favor, either the time in which the defendant is required to serve a bill of exceptions is suspended until the appointment of an administrator, or the court, on defendant's application, had the power to extend the time until there was an administrator. (Page 523.)
6. **MUNICIPAL CORPORATIONS—EXCAVATION IN STREET—INJURY TO PEDESTRIAN—ACTION FOR INJURY—QUESTION FOR JURY.** In an action for personal injury from defendant's negligence in leaving an excavation in the street unguarded and unlighted, *held*, on the evidence, that whether plaintiff stepped into an excavation at the place alleged in the complaint, whether defendant had finished the work, and had turned it over to the city before the accident, whether there was an excavation at the place in question and its extent and character, and whether plaintiff was guilty of contributory negligence, were for the jury. (Page 524.)

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7. MUNICIPAL CORPORATIONS—EXCAVATION IN STREET—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—PRESUMPTION. In such case, it could not be conclusively inferred, from the fact that plaintiff resided near by, that she had full knowledge of the extent and character of the excavation. (Page 524.)
8. DAMAGES—PLEADING AND PROOF—EXPENSE—PHYSICIAN'S SERVICES. In an action for personal injury, an allegation that plaintiff had been and would be put to great expense in curing such injury, without challenge by special demurrer, was good enough to support proof of any expense; such as proof that \$250 was the reasonable value for the services of a doctor who attended plaintiff. (Page 525.)
9. DAMAGES—INSTRUCTION—CONFORMITY TO EVIDENCE. In an action for personal injury from stepping into an excavation, where there was evidence of injury to plaintiff's leg and no evidence that the displacement and disease of the kidneys or the liver and intestines were traceable to such injury, the refusal to exclude damages resulting from an operation for such other diseases and for pains suffered from such diseases and the operation was erroneous. (Page 526.)
10. DAMAGES—INSTRUCTIONS—CONFORMITY TO EVIDENCE. In such action, where the only item of expense as to which any evidence was offered was as to the reasonable value of the services of the doctor who attended the plaintiff's injured leg, a charge permitting the jury to consider any cost or necessary reasonable expense in curing the injury was erroneous as beyond the issues made by the evidence. (Page 527.)
11. ABATEMENT AND REVIVAL—SURVIVAL OF CAUSE OF ACTION—ACTION FOR PERSONAL INJURY. A cause of action for personal injury due to negligence, will not survive the death of the plaintiff. (Page 528.)
12. ABATEMENT AND REVIVAL—DEATH PENDING APPEAL—EFFECT OF REVERSAL. In such case the cause of action was merged in the judgment, so that when the judgment was reversed the cause of action was gone and the action would be dismissed.<sup>1</sup> (Page 528.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourn*, Judge.

Action by Genevieve Candland, for whom, after her death, A. D. Candland, her administrator, was substituted, against J. W. Mellen.

Judgment for plaintiff. Defendant appeals.

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<sup>1</sup>*Mason v. U. P. Ry. Co.*, 7 Utah. 77, 1 C. J. pp. 168, 169, 171, 24 Pac. 796.

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Appeal from Third District.

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REVERSED and case remanded, with directions to vacate the judgment and dismiss the action.

*Stewart, Stewart and Alexander*, for appellant.

*M. E. Wilson and E. G. Palmer*, for respondent.

STRAUP, C. J.

Genevie Candland brought this action to recover damages for an alleged personal injury. A judgment was rendered in her favor. The defendant appeals. The judgment was rendered and entered on the 30th of April, 1914. On May 2nd a motion for a new trial was served and filed. The motion was overruled on the 9th, of which notice was given on the same day. On May 27th, the court granted the defendant "60 days to prepare, serve, and file a bill of exceptions"; on July 17th, further time, to and including August 16th; on August 11th, to and including September 15th; on September 12th, to and including October 15th; on October 13th, to and including November 2nd. Genevie Candland died on the 5th of August, 1914. On the 2nd of October of that year, an administrator was appointed. On the 22nd of October, the administrator was substituted as the party plaintiff. On the 27th of October the defendant served on the attorneys for the administrator, who also represented Mrs. Candland in the action, his proposed bill of exceptions. It was settled on the 30th of October. On that day the defendant served on the attorneys for the administrator, and filed, his notice of appeal. Within thirty days thereafter the transcript on appeal was filed.

A motion is made to dismiss the appeal on alleged defects in the notice of appeal, and uncertainty of descriptions of the judgment appealed from. The notice reads:

"The defendant does hereby appeal from the verdict and judgment entered on the verdict in the above-entitled cause on or about the 30th day of April, 1914, and from the order overruling a motion for a new trial, made and entered on the 9th day of May, 1914, and from the whole thereof."

Of course, no appeal lies from the order overruling the mo-



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tion for a new trial. An appeal lies only from a final judgment entered in the cause. The judgment was entered on the 30th of April. It became final when 1, 2, 3, the motion for a new trial was overruled on the 9th of May. The point made is that the final judgment was entered on the 9th of May; that that was the only appealable judgment, and, since the notice does not state that the appeal was taken from the judgment entered on the 9th of May, the notice did not properly identify or describe the judgment which was appealable, but described one unappealable. We do not see anything to this. There was no judgment rendered or entered on the 9th of May. The only judgment rendered and entered in the cause was rendered and entered on the 30th of April. Because of the motion for a new trial made within the time allowed by the statute, the judgment did not become final until the motion was disposed of. By overruling the motion, the court refused to disturb the judgment which theretofore had been made and entered on the 30th of April. The judgment thus stood as it was made and entered. The notice sufficiently identified and described that judgment as the judgment appealed from, the only judgment made and entered in the cause. The reference in the notice to the verdict is surplusage. The statement that the appeal is also taken from the order overruling the motion for a new trial does not destroy nor affect the statement that the appeal is taken from the judgment. The reference to the order can but serve the purpose to show when the judgment became final and the right to an appeal began. The motion to dismiss is denied.

A motion also is made to strike the bill of exceptions on grounds: (1) That when the court, on July 17th, extended the time to serve and file a bill, the time had expired, and that the court then was without power to grant 4 further time; and (2) that the court was without power to make orders extending the time after the death of Mrs. Candland and before the appointment and substitution of an administrator as plaintiff in the cause. The first is based on the order of May 27th, granting the defendant sixty days to serve and file a bill. It is urged the sixty days date from May

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9th when the notice of overruling the motion for a new trial was served. The time from that date until the next date, July 17th, when further extension was granted, is sixty nine days. Thus it is argued that the July order was made after the time theretofore granted had expired. We think the proper construction of the May 27th order is sixty days from that date; sixty days from the date the order was made. Counting sixty days from that time, the order of July 17th was within time.

The second ground is based on the proposition that after the death of Mrs. Candland, and before the appointment and substitution of an administrator, the court was without power to grant an extension of time to serve and 5 file a bill. To support that the cases of *Judson v. Love*, 35 Cal. 463, *Shartzer v. Love*, 40 Cal. 93, *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371, and *Coffin v. Edgington*, 2 Idaho (Hasb.) 627, 23 Pac. 80, are cited. We do not think they support the contention. They are cases to this effect: That the service of a notice of an appeal or motion for a new trial, after the death of the other party and before the appointment and substitution of an administrator, was of no effect and did not confer jurisdiction to proceed. We think that is true. Had the defendant attempted to serve a bill or to have it settled after Mrs. Candland's death, and before the appointment and substitution of an administrator, such service or settlement would not be good. But the bill was not served nor settled until an administrator was appointed and substituted in the cause. The death of Mrs. Candland, after judgment, could not prevent the defendant from protecting his rights to further proceed in the cause when there was an administrator. One of two things must be true: Either the time in which the defendant was required to serve a bill was suspended by the death of the original plaintiff and until an administrator was appointed, or the court, by orders, on the defendant's application, had the power to keep the time alive until there was an administrator. Doing that is not proceeding in the cause without an adversary. Perhaps the better rule is that the time from the death to the appointment of the administrator was suspended. If that be not true, then must

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the other be true; for, if neither be true, then was the defendant remediless. The motion to strike the bill is denied.

The defendant, under contract with Salt Lake City, was engaged in curbing and guttering streets near where the deceased resided. It is charged that he negligently left excavations exposed, unguarded, and unlighted, by reason of which plaintiff's intestate, in the nighttime, and on the 20th of September, 1913, stepped into an excavation, thereby wrenching and spraining her leg, "so that said plaintiff was and still is made to suffer great mental and physical pain and anguish and so that she was made and still is sick, sore, and lame, and so that she has been confined to her bed from the 20th day of September, 1913, until now, and is still so confined, and so that said leg has been wholly useless to her, and so that she has thereby been prevented from walking and from performing her household duties as a housewife; that, by reason of the aforesaid injury, said plaintiff has been and for all time will be almost totally disabled, and has been and will be put to great expense in curing said injury, to wit, \$800"; and "that by reason of the matters and things hereinbefore set forth, plaintiff has suffered damage in the sum of \$5,000." She had judgment for \$500.

Complaint is made of the court's refusal, at the conclusion of all the evidence, to direct a verdict in the defendant's favor. The grounds of the motion are: (1) That in the complaint it is alleged the excavation in which the plaintiff's intestate stepped was at the "northwest corner" of two named streets, and that the proof showed that she 6, 7, stepped into an excavation at or near the southwest corner of the streets—an excavation, as is contended, not made by the defendant. (2) That the defendant was not negligent, and that he had finished the work several days before the accident and had no further duty to perform in the premises. And (3) that plaintiff's intestate was guilty of contributory negligence. We think no error was committed in the ruling. There was but one witness who testified concerning the deceased's stepping into the excavation. That witness was her sister who accompanied her at the time. In portions of her testimony she testified that the deceased

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Appeal from Third District.

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stepped into an excavation on the south side of the street; in other portions, at the place alleged in the complaint. We think that matter was for the jury.

As to whether the defendant had finished the work and had turned it over to the city before the accident, and as to whether there was an excavation at the place in question and the extent and character of it, the evidence is in conflict. So all that was for the jury.

Evidence was given to show that the excavation was about a foot and a half or two feet deep, that it was made by the defendant, that a plank extended over it, and that the excavation was left unguarded and unlighted by the defendant. The deceased's sister testified that the night was dark, and that she, preceding the deceased, walked on the plank over the excavation; that the deceased, following her, stepped or fell into the excavation; and that the witness returned and assisted her out and to her home near by. Because of severe illness at the time of the trial, plaintiff's intestate was not a witness in the case. There is no direct evidence what knowledge she had of the excavation. From her residing near by, it is argued, in effect, that it ought to be conclusively inferred that she had full knowledge of the extent and character of it. No such conclusive presumption can be indulged. And further, though she had such knowledge, still that alone would not render her conclusively guilty of negligence in attempting to cross the excavation. There is no evidence to show that she was careless in her movements, or failed to use due care in observing where she was walking. At least there is nothing to show that she was conclusively guilty of negligence in such respect. We therefore think all these questions were for the jury.

It also is claimed error was committed in allowing plaintiff's intestate, over the defendant's objections, to show that \$250 was a reasonable value for the services of the doctor who attended her leg. It is claimed that that was improper because such damages were special and as such ought to have been, but were not, alleged. We have referred 8 to the allegations of the complaint in such respect, "that she has been and will be put to great expense in curing said

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injury, to wit, \$800." True, the allegation, "great expense in curing said injury," is quite general. But, without challenge by special demurrer, it is good enough to support proof of any expense. The doctor's services were expenses. We think the evidence was properly received.

We come now to the charge. The next day after the injury a doctor was summoned. A couple of days after that he turned the case over to a bone specialist. He found the ankle and knee joint inflamed, swollen, tender, and painful. 9 He administered local applications. He visited the plaintiff on and off for about a month, when another doctor, with him, saw the case. The conclusion was then reached that plaintiff's intestate had tuberculosis of the knee joint. They gave testimony that the injury could have caused that; that if a person had tubercular bacilli in the body they might lodge in the inflamed knee joint, and in that way produce tuberculosis of the knee; but that the injury itself would not spontaneously produce a tubercular condition. Her leg was put in a cast and rest prescribed. While her leg was yet in the cast, she, in March following, suffered from abdominal ailments and disorders. Three physicians diagnosed the trouble as appendicitis. An operation was performed. The appendix was successfully removed, but it was found not to be involved, and that that was not the cause of the disorder. It then was found that she was suffering from an enlarged, sclerotic, and tubercular condition of the liver, a diseased and displaced kidney, and diseased intestines. It is not shown that these disorders were traceable to the injury to the leg. She was kept at the hospital most of the time, gradually grew worse, and at the time of the trial was unable to be a witness. The defendant requested the court to charge that plaintiff's intestate was not entitled to damages resulting from the operation in March, nor for pain suffered from such sickness and operation. The court refused that, and charged that:

"In determining the amount of damage to be awarded, if you find that the plaintiff is entitled to damages, you are only to award damages sustained which did in this case naturally and directly result from the wrongful acts alleged and from the injuries described as disclosed by the evidence."

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Appeal from Third District.

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It is thus seen the court permitted the jury to say whether the ailments and disorders from which plaintiff's intestate suffered in March, and which resulted in the operation and her confinement in the hospital, were due to the spraining and wrenching of her leg, and whether they were the direct and natural result of the defendant's alleged negligent acts. We do not see any evidence to justify a finding that the displacement and disease of the kidney, or the disease of the liver and intestines, were traceable to the injury to the leg. Because of a want of such proof, we think the court, on the defendant's request, ought to have excluded those from the consideration of the jury. Since the verdict was only for \$500, it may be argued that the jury in fact excluded them. But that is speculative. On the record it cannot be told whether the jury did or did not do that.

Evidence was given to show that one doctor regularly attended plaintiff's intestate for the injury to her leg, that another attended her for other disorders, that two 10 others assisted in the operation, and that she, after the operation, was, much of the time, confined in the hospital. The only item of expense concerning which any evidence was adduced was as to the reasonable value of the services of the doctor who attended the leg, and that that service was worth \$250. No evidence was adduced as to the value of services of the other physicians who attended her, nor for the operation, nor for expenses at the hospital. In determining the amount of damages which the jury could award, the court, among other things, told them that they could "take into consideration any cost or necessary and reasonable expenses that it may be necessary for her to pay in curing the injury, if any, which she suffered by reason of the negligence of the defendant." Complaint is made of that. It is urged that, in view of the evidence, the jury, as to expenses, ought to have been restricted to the reasonable value of the services rendered by the doctor who attended Mrs. Candland's leg, but that the charge permitted the jury to "take into consideration any cost or expense," etc. We think the contention well founded and that the jury, in such respect, were misdirected.

For these errors must the judgment be reversed. What dis-

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position should be made of the case? Were the original plaintiff alive, of course, the case should be remanded for a new trial. Because of her death after judgment and because of a reversal, does the cause abate? As to that we have not the benefit of counsels' views.

As we view the matter, we think the cause does not survive. It, however, was merged in the judgment which, had it not been disturbed, could have been enforced. But 11, 12 when the judgment is gone the cause is gone. *Mason v. U. P. Ry. Co.*, 7 Utah, 77, 24 Pac. 796, 1 C. J. pp. 168, 169, 171.

The order therefore is that the judgment be reversed, and the case remanded, with directions to vacate the judgment and to dismiss the action. Costs to the appellant.

FRICK and McCARTY, JJ., concur.

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SMITH v. PHOENIX CONST. CO.

No. 2741. Decided July 30, 1915. (151 Pac. 46.)

**MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.** That a master did not tie a roll of blankets on a wagon does not show him negligent, for he could not assume that the blankets which slipped down upon plaintiff would knock him from the seat under the feet of the mules.

Appeal from District Court, Third District; Hon. *Geo. G. Armstrong*, Judge.

Action by John Smith against the Phoenix Construction Company, a corporation.

Judgment for plaintiff. Defendant appeals.

REVERSED and REMANDED.

*King & Nibley* and *P. T. Farnsworth, Jr.*, for appellant.

*W. R. Hutchinson* for respondent.

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Appeal from Third District.

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STRAUP, C. J.

This is an action to recover damages for alleged personal injuries. The plaintiff had judgment. The defendant appeals. The defendant was engaged in construction work in Idaho. The plaintiff, twenty-five years of age, was employed by it as a laborer, digging holes, shoveling gravel, mixing concrete, etc. The defendant, with wagons, was moving its camping outfit and commissary supplies, etc., from Cleveland, Idaho, to Weston, Idaho, a distance of about twelve miles. One of the wagons with a box, the sides of which were about a foot high, was loaded with boxes of crackers, canned goods, tobacco, sacks of sugar, etc., and two rolls of blankets. The boxes and sacks of sugar were piled in the wagon bed, and extended about a foot above the sides of the box. On top of the boxes or sugar were placed the two rolls of blankets. After the wagon was loaded and ready to start, the defendant's foreman directed the plaintiff to ride on the wagon and sit with the driver. The seat was in front. The plaintiff had nothing to do with loading the wagon, and had no duty to perform in driving or in hauling the load. He testified that as he sat on the seat the blankets were about two or three feet back of him, and extended about two feet above his head. He further testified that:

"The road was all level ground. When we struck about a foot and a half hill, the blankets rolled over and knocked me off."

\*He fell forward under the mule's feet. The driver jumped, the team ran away, and the plaintiff was injured by one of the mules stepping on him, and a sack of sugar striking him.

The alleged negligence is the defendant's failure to rope or secure the blankets to prevent them from falling. It is contended that the judgment cannot be upheld for two reasons: Assumption by the plaintiff of the risk; and failure of proof to show negligence on the part of the defendant. The first is based on the theory that the plaintiff knew that the blankets had not been roped. Holding, as we do, with the defendant on the second ground, it is unnecessary to express an opinion as to the first. There is testimony to show that it was customary to rope "high loads," but this in no sense was a high load.



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And then it is not ordinarily to be expected that a roll of blankets rolling or falling and striking one is likely to produce injury likely to throw one off his seat, or otherwise to hurt him. We do not think the defendant, in the exercise of ordinary care, was required to anticipate injury from such a source, and therefore that he ought to have made reasonable efforts to guard against it by tying or otherwise securing the blankets.

Let the judgment be reversed, and the case remanded for a new trial; costs to the appellant.

Such is the order.

FRICK and McCARTY, JJ., concur.

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RYAN v. UNION PAC. R. CO.

No. 2713. Decided July 30, 1915. (151 Pac. 71.)

1. RAILROADS—INJURIES TO PERSONS ON TRACKS—ACTIONS—EVIDENCE. In an action for the death of one run down by cars being switched, evidence held to warrant findings that the railroad company and deceased were both negligent. (Page 535.)
2. RAILROADS—INJURY TO PERSON ON TRACK—PRESUMPTIONS—CARE. It will be presumed that deceased, who was run down by defendant's cars, was in the exercise of due care. (Page 535.)
3. RAILROADS—INJURIES TO PERSONS ON TRACKS—CONTRIBUTORY NEGLIGENCE—JURY QUESTION. In an action for the death of one run down by cars on a switch track, the question of deceased's contributory negligence held for the jury. (Page 535.)
4. TRIAL—INSTRUCTIONS—PROVINCE OF JURY—WEIGHT OF EVIDENCE. Both persons walking upon industrial switch tracks and the railroad company which pushes cars thereon are bound to exercise ordinary care, but it is for the jury to say whether such care was exercised in view of the frequency of the use of the tracks; hence a charge, requiring the jury, if the track was used infrequently, to demand more care of the railroad company and less of the individual using it, is improper as on the weight of the evidence. (Page 538.)
5. EVIDENCE—RAILROADS—INJURIES—PRESUMPTIONS—EFFECT. Presumptions are effective only when the facts do not appear; hence where the facts surrounding the running down of plaintiff's

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intestate did appear, the jury, in determining his negligence, should not consider the presumption of due care from the instinct of self-preservation. (Page 538.)

6. RAILROADS—INJURIES TO PERSONS ON SIDINGS—LAST CLEAR CHANCE DOCTRINE—EVIDENCE. In an action for the running down of plaintiff's intestate on a siding, *held* that under the evidence it was a question for the jury whether his position of peril was discovered, and hence it was proper to submit the last clear chance doctrine. (Page 539.)
7. RAILROADS—INJURIES TO PERSONS ON TRACKS—LAST CLEAR CHANCE DOCTRINE. While the last clear chance doctrine is applicable in a proper case where the perilous position of the party could or ought to have been discovered, a railroad company is not liable for running down plaintiff's intestate on an industrial switch track where he, up to the moment of the accident, was negligent in failing to look for and discover the train, though the accident was also the result of the concurring negligence of the railroad company in failing to maintain a lookout, for an opposite holding, would in effect, destroy the defense of contributory negligence. (Page 540.)

Appeal from District Court, Second District; Hon. N. J. Harris, Judge.

Action by T. D. Ryan, as administrator of the estate of Kantara Yoshitake, deceased, against the Union Pacific Railroad Company.

Judgment for plaintiff. Defendant appeals.

REVERSED and REMANDED.

P. L. Williams and Geo. H. Smith, and C. R. Hollingsworth, for appellant.

J. G. Willis for respondent.

#### APPELLANT'S POINTS.

The deceased was under the duty of attentively looking and listening before he went upon the tracks in question, to discover whether or not a train was approaching from either direction, and if by so doing he could have discovered that

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one was approaching, as in fact it was, his conduct demonstrates either that he did not look at all, or if he did look, he did not heed what he saw or what was to be seen. (*Burges v. Salt Lake City Ry. Co.*, 17 Utah 406; *Johnson v. R. G. W. Ry.*, 19 Utah 77; *Silcock v. Rio Grande*, 22 Utah, 179; *Rogers v. R. G. W.*, 32 Utah, 267; *Teakle v. San Pedro, etc.*, 32 Utah, 276; *Wilkinson v. O. S. L. R. R.*, 35 Utah, 110; *Pratt v. U. L. & Ry. Co.*, 38 Utah, 500; *Bates v. S. P., L. A. & S. L. R. R.*, 38 Utah, 568; *Oswald v. U. L. & Ry. Co.*, 39 Utah, 245.)

In *Jensen v. D. & R. G.*, Supreme Court of Utah, decided January 30, 1914, 44 Utah, 100, 138 Pac., 1185, this court specifically held in discussing the last chance doctrine that it did not apply and could not be invoked in a case where the negligence of the plaintiff or deceased was contemporaneous and concurring with the defendant's negligence. (34 L. R. A. (N. S.) 957, and monographic note; 55 L. R. A., 418, and monographic note; *Dyerson v. R. R. Co.*, 87 Pac., 680, 7 L. R. A. (N. S.) 132; *Kirtley v. C. M. & St. P. Ry. Co.*, 65 Fed., 386; *Railroad Co. v. Bailey*, 27 L. R. A. (N. S.) 379 (Va.); *Wilson v. Railway Co.*, 129 N. W. (Iowa) 340; *Bruggeman v. Railroad Co.*, 147 Iowa, 187; 123 N. W. 1007; *A. T. & S. F. v. Taylor*, 196 Fed., 878.)

#### STRAUP, C. J.

This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused through the negligence of the defendant. The plaintiff had judgment, from which the defendant appeals.

One of the assignments presents the ruling refusing the defendant's motion for a direction of the verdict. The deceased was in the employ of a cement company at Devil's Slide. There he was run over by a train of cars operated by the defendant and killed. The charged negligence is failure to give warnings of the train's approach and to observe a lookout. The motion was based on alleged grounds that the deceased was negligent and that his, and not the defendant's, negligence was the proximate cause of the collision. At Devil's Slide the defendant's main line runs in an easterly and westerly direction. About one-fourth of a mile north of

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the main line is the cement company's plant and premises. From the main line is a spur or branch track about 3,000 feet long, running as it leaves the main line for a short distance somewhat parallel with it, and then, with a pronounced curve, northerly upgrade to and beyond the plant. When it reaches the plant the spur branches into two parallel tracks close together, and so continues to the northern limits of the plant and premises. Thence on, there is again but one track. The two tracks thus running through the cement company's premises are so close together that, as expressed by one of the witnesses, there is just room enough for the passing of cars; another, that the distance from the center of one of the tracks to the center of the other is about thirteen feet. There are buildings of the cement company on both sides of the tracks, consisting of an office or laboratory building, a power house, cement plant, storage and ware houses, crushers, bins, kilns, and other buildings. These buildings, except the office building, are within three or four feet of the track. This double track thus runs between the buildings for a distance of about 600 feet. The space between the buildings, and in which the tracks are laid, is spoken of by the witnesses as a sort of an alley, the width of which, from building to building, is about twenty-four feet. The tracks are used to run empty cars to the plant and to take out loaded cars. Devil's Slide is a little town to the west and north of the junction of the main line and the spur line. Croyden is a little settlement north of the plant, and is at the terminus of the spur or branch track. There were about 150 men at work at the plant. They, and others, passed up and down and across the tracks at all hours of the day, as one of the trainmen put it, "every few minutes there would be some one cross there." Cars were run from the main line and pushed up to the plant, and loaded cars taken down every day, generally between seven and eleven o'clock in the morning. During the forenoon of the day of the accident the deceased was at work in the basement of the cement company's office, making concrete brick or blocks. That was at or near the south junction of the double tracks running through the alley or at the southern portion of the cement company's plant and premises. The distance from there south

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and west, along the spur track to the main line, is about 1,500 feet. The deceased was run over and killed in the alley along the double track about 400 feet north of the office building, some of the witnesses stating between ten and eleven o'clock, others, shortly before noon. No one saw him leave the office building. He was first seen walking slowly north along the two tracks in the alley within about forty or fifty feet from the place where he was struck by the train and killed. The track to the right of him was occupied by box cars. The track to the left of him then was clear. The defendant at that time was shoving or backing a train of twenty-one cars along the spur track up towards the cement plant and premises and in the direction the deceased was walking, intending to leave eleven empty cars on the track to the left of him. The cars were forty feet in length. The engine shoving the train thus was about 840 feet from the forward car. Because of the curve and length of the train the engineer's view in advance of the forward car was obstructed. There was no one on the forward car as the train approached, nor on any of the cars, except the fireman and engineer on the engine. No whistle was sounded or other warning signals given of the train's approach. Before that, and some time before the deceased entered the track and walked up the alley, some switching of cars had been done on the premises of the cement company, cars taken from one track and drawn down and placed on the other. One of the witnesses for the plaintiff testified that when he first saw the deceased walking along the track the train was approaching him about 100 or 150 feet away, moving at about ten miles an hour in the direction the deceased was walking, and that the deceased walked about forty or fifty feet on the track on which the train was moving before he was struck. Another witness for the plaintiff testified that when he first saw the deceased the train was about fifty feet from him; that the deceased then was walking between the two tracks, and, coming to a wet or muddy place, stepped on the track on which the train was moving, and there walked twenty or thirty feet before he was struck. Both witnesses testified that the deceased was looking in the direction he was walking, and that during the time they saw him he did not

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look back in the direction the train was approaching, and did not look in that direction when he stepped from between the tracks and on the track where he was struck. These witnesses endeavored to attract his attention by hallooing and shouting, but were unable to make him hear because of much noise occasioned by operations of the crushers and machinery at the plant. As the train approached the southern portion of the cement company's premises, the conductor of the train stood in front of the office building near the south junction of the two tracks and on the east side of them. On the other side stood a brakeman in readiness to cut loose from the train the eleven cars when they had been shoved up the required distance. These witnesses testified that when the forward car reached them they glanced up the track or alley, and that they then saw no one. After the forward car had passed them their view up the track was obstructed by the cars. The forward car struck the deceased just at the place where the eleven cars were intended to be placed and cut loose from the train. The deceased was instantly killed. The forward truck of the car striking him was derailed by the impact, and the derailed car jammed against a car standing on the track. The train crew had no knowledge that the deceased had been struck until one of the witnesses who testified for the plaintiff ran down and notified them.

We thus have a case where there is ample evidence to justify findings that both parties were negligent. That is not disputed. The defendant, however, urges that the question of its negligence was one of fact, and that of the deceased's was one of law, especially as to whether the 1, 2, 3 deceased's or the defendant's negligence was the proximate cause. If the defendant was negligent—and there is ample evidence to show that it was—then its negligence was a direct cause. There can be no doubt of that. The serious question concerns the deceased's negligence, whether it was for the jury or the court. Independent of evidence, the presumption should be indulged that the deceased exercised due care and did all that reasonably was required of him. No one saw him leave the building or enter the track. He was first seen walking forty or fifty feet along the track through the

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alley. One witness testified that he was walking on the track; another, between the tracks, and that he then stepped on the track and walked twenty or thirty feet before he was struck. There is direct evidence that he, during that time, did not look in the direction from which the train came. Because of that the defendant urges he was conclusively guilty of negligence. The triers of fact, under all the circumstances, might say that a failure to look back during that time, or a failure to look when he stepped on the track if he was walking between the tracks, was negligence. But we ought not say that as a matter of law. As well say the defendant was conclusively guilty of negligence because of its failure to give signals or to have a man stationed on the forward car as the train approached, or to observe a lookout, which omissions also were undisputed. If, when the deceased first entered or was about to enter the track, he looked for approaching cars and saw none and then proceeded up the track, we should not say that he was conclusively guilty of negligence because he did not again look within the time the witnesses saw him.

There is no direct evidence to show at what place he entered the track. As inferences two views may be taken. One is that he entered the track near, or opposite, the office building where he was at work at the south junction of the two tracks; the other, that he entered the track from one of the buildings, or a place between them, farther up the track. If he entered the track opposite the office building he walked along the track a distance of about 400 feet before he was struck. While the record shows that switching had been done about the cement premises shortly before the accident, yet, if the deceased entered the track opposite the office building, the record does not show where the train then was. It may have been down by or near the main line, a distance of about 1,500 feet away, and not in view. The deceased thus may have looked when he entered the track, and, seeing nothing of the train, may have thought the switching was over, and that the train had departed. He was not at a place where a train might momentarily be expected. He, of course, was required to anticipate cars during the switching period; but that usually was before eleven o'clock. These, of course, are inferences most favorable

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to the plaintiff. If, on the other hand, the deceased entered the track but forty or fifty feet from where he was struck, then, had he looked as he entered the track, he could have seen the train approaching him. Which of these inferences ought to have been deduced was for the jury. It may be conceded as settled law that one who approaches or enters a railroad track without looking, at a place where cars may momentarily be expected, generally is conclusively held guilty of negligence. But the doctrine is not, to its full extent, applicable to the situation before us. The deceased and 150 others were at work about the plant. Their duties took them up and down and across the track at all hours of the day. That the deceased was going up the track in the discharge of duties is inferable. There was but a short period each day when cars were operated along the tracks, empty cars and cars with supplies taken up to, and loaded cars taken down from, the plant. That generally was done between seven and eleven o'clock in the forenoon; as some of the witnesses testified, usually in the morning. When that switching was over no further operation of cars was had about the plant until the next day. Just when the accident happened is, on the record, uncertain. Some witnesses testified between ten and eleven o'clock, others shortly before noon. Had the deceased not been killed, but only injured, and, in an action to recover for his injuries, had testified that he entered the track opposite the office building, that he then looked and saw no cars, and, seeing none, believed the switching was over, and that the train had departed and that he then proceeded up the track without again looking back before he was struck, the court, under such circumstances, would hardly be justified in holding him guilty of negligence as matter of law. Since all that, on the record, is inferable we think the question of the deceased's negligence was one of fact and not of law, and that the court, therefore, did not err in refusing to direct a verdict for the defendant.

Complaints are also made of the charge. As to the defendant the court charged:

"You are instructed that if you should find, by a preponderance of the evidence that the train in question was oper-



ated along and over a railroad track of which infrequent use was made, it was more incumbent upon the defendant, when so doing to give warning of said train's approach than if it had been a track of regular and frequent use, and running on regular time." 4

As to the plaintiff the court gave this:

"You are instructed that if the railroad track upon which the train in question was operated at the time of the injury to said decedent was a track of infrequent use, the decedent would not be expected to exercise the same degree of caution in passing over said track, as if it were a railroad track of frequent and regular use."

We think both are erroneous. Of course the frequency or infrequency with which cars are operated over the track had a bearing on the care to be exercised by the parties, and was a factor of more or less weight in determining such question. But the court, in such respect, charged on the weight of the evidence, and bound the jury to give not an evidentiary, but a legal, effect to it—required them if the track was used infrequently to demand more care of the defendant and less of the deceased. The standard of both was ordinary care. When the court stated that, and defined what was meant by it, its duty in that regard was discharged. It then was within the province of the jury, in view of the infrequent use of the track, and of all other evidence bearing upon the question, to say whether what the parties, did, or failed to do, did or did not, come up to that standard.

The court also gave this:

"You are instructed that the instinct of self-preservation and the disposition of men to avoid personal harm re-enforce an inference that a person killed or injured was in the exercise of ordinary care, and that the natural instinct which leads men in their sober senses to avoid injury and preserve life is an element of evidence to be considered in connection with the other testimony in this case." 5

In the absence of evidence there is a presumption that the deceased used due care and, for his protection, did all that reasonably was required of him. Had the court charged that and stopped, the charge would not have been erroneous. When,

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however, facts and circumstances are proven to show just what the deceased did, or failed to do, then his care, or the want of it, is to be determined, not on the presumption, but upon the facts and circumstances proven. That is, whenever the facts or circumstances are shown concerning which the presumption is indulged, the presumption ceases, and the controversy is to be decided by the weight of the evidence adduced. That is not what the court charged. As charged, the jury were permitted to cast the presumption on the scales and to consider and weigh it with the proven facts and circumstances. There is a presumption of sanity, but when evidence respecting the sanity or insanity of the person whose mental condition is the subject of inquiry is adduced, the presumption, except as it bears on burden of proof, is spent and the controversy is to be decided on the weight of the evidence adduced. There, as here, the presumption calls for evidence; but when it is adduced the controversy must be decided on the evidence, not on the presumption. Here the court, regardless of what facts were proven as to the deceased's conduct, in effect charged that the presumption itself was evidence to be considered in connection with the proven facts. That was wrong.

The court submitted the case on the theory of the last clear chance doctrine, and, in substance, charged that though the deceased was negligent, and though his negligence "directly contributed to the injury," yet, if the defendant was also negligent and if after discovering the deceased in 6 a perilous situation, or, in the exercise of ordinary care, could have discovered him in a place of danger, and that the defendant failed to exercise ordinary care to prevent the collision, then the defendant's negligence was the proximate cause of the injury and death. The doctrine rests on premises that both parties are negligent and relates to the question of which negligence is to be regarded as the proximate and which the remote cause. When it is assumed, as does the charge, that the injured's or deceased's negligence "directly contributed to the injury," that is, was a direct cause, a cause as direct as that of the offender, then that is the end of the inquiry, and renders any further charge on the doctrine inapplicable. Though the deceased was negligent in walking up the track

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without looking within the time the witness saw him, and in failing to discover the train's approach, and if, as assumed in the charge, his presence in a perilous situation was discovered by the train crew in time to have avoided the collision, but who failed to use reasonable efforts to prevent it, then the defendant's negligence may be regarded the proximate and the deceased's the remote cause. There, however, is no direct evidence that his presence was discovered by the train crew. The conductor and brakeman testified that when the train was about 400 feet from the place of the accident, they looked up the track and saw no one. Their view, after that, was obstructed by the forward car as it passed them and went up the track. If the deceased entered the track opposite the office building, and if the conductor and brakeman looked up the track as testified to by them, it can be argued that they must have seen him. Others saw him when the train was 100 or 150 feet from him. Another saw him walking slowly up the track forty or fifty feet before he was struck. If the train moved ten miles an hour, as testified to by members of the train crew, it traveled approximately 200 or 250 feet while the deceased walked forty or fifty feet. True, it may also be argued and inferred that the deceased entered the track not opposite the office building, but farther up the track, and after the forward car had passed the conductor and brakeman. There thus is little indirect evidence that the deceased was discovered by the train crew. But weak as it is, we think the plaintiff was entitled to go to the jury on the theory that the deceased was discovered.

The court, however, submitted the case also on the theory that, though the train crew had not discovered the deceased, yet, if they, in the exercise of ordinary care, could have discovered him in time to have avoided the collision, 7 and, omitting to exercise that care, failed to discover him, then the defendant's negligence was the proximate cause. In this the court also erred, not because the doctrine is applicable only to cases after discovery, for we are committed to the rule that the doctrine, in a proper case, is also applicable where the perilous situation of the party injured could or ought to have been discovered, but, because the assumed neg-

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ligence of both parties was, in such respect, active, concurring, combining, and contributing at the very time of the impact, and the one as direct and proximate as the other; that is, if the defendant be found guilty of negligence in not giving signals of the train's approach, or in not observing a proper lookout to discover the presence of those reasonably expected to be on or near the track and in danger of being struck by moving cars, and if the deceased, as he was walking along the track, also be found guilty of negligence in failing to look for and to discover the train's approach, then the negligence of both was active and concurring up to the very time of the impact, and the collision the result of the combined and concurring negligence of both, and the one as direct and proximate as the other. In such case the most that could be said is as to which negligence, when the one is compared with the other, was the greater or more culpable. But the doctrine of comparative negligence does not prevail in this jurisdiction, and is not to be confused, as it sometimes is, with the doctrine of the last clear chance. The rule here is that contributory negligence, if it is a direct and contributing cause, bars recovery. When the court charged, as it did, that if the defendant was guilty of negligence, and though the deceased was guilty of contributory negligence, and that "the negligence of each directly contributed to the injury," yet, if the defendant, in the exercise of ordinary care, could have discovered the deceased in a position of peril in time to have avoided the injury, then the defendant's negligence was the proximate and the deceased's the remote cause, it in effect destroyed the defense of contributory negligence and gave a charge inconsistent with another that, though the defendant was negligent yet, if the deceased "was also negligent in any respects in the performance of his own duty, and that neglect contributed in any degree to his accident and death, the plaintiff in this case cannot complain that the defendant was also negligent, but your verdict in such event must be for the defendant."

For these errors the judgment is reversed, and the case is remanded for a new trial. Costs to the appellant.

FRICK and McCARTY, JJ., concur.

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## MOYLE v. THOMAS et al.

No. 2647. Decided August 4, 1915 (151 Pac. 361).

1. **APPEAL AND ERROR—REVIEW—UNASSAILED FINDINGS.** Finding of fact by the trial court which is unassailed by either party must, for the purposes of decision, be treated as though the fact found was stipulated. (Page 548.)
2. **BOUNDARIES—ASCERTAINMENT—REVERSING CALLS.** The southeast corner of a lot of land owned by decedent was uncertain. At an administrator's sale defendant acquired a frontage of three rods commencing at the southeast corner. The decree of distribution under which plaintiff traced her title distributed the remainder to the heirs and described their land as commencing at a point three rods from the southeast corner and thence running 133.65 feet. *Held* that, as that is certain which can be made certain, plaintiff's interest may be ascertained by running from the southwest boundary a line of 133.65 feet. (Page 548.)
3. **EXECUTORS AND ADMINISTRATORS—ADMINISTRATOR'S SALE—PURCHASER.** A purchaser at an administrator's sale takes subject to the rule of *caveat emptor*, and hence defendant could not complain, though he did not receive the full three rods, and plaintiff could not complain if, when the uncertain boundary was located, defendant had more than the three rods. (Page 548.)
4. **BOUNDARIES—AGREED BOUNDARIES—ACQUIESCENCE.** Where, within three years after her purchase, plaintiff instituted a suit wherein she sought to quiet her title to land embraced within defendant's fence, defendant could not, though the suit was twelve years later dismissed for want of prosecution, contend, a second suit being promptly instituted, that there was an agreed boundary line by acquiescence. (Page 552.)
5. **ADVERSE POSSESSION—WHAT CONSTITUTES.** Nor in such case could defendant set up title by adverse possession or limitation. (Page 553.)
6. **ESTOPPEL—EQUITABLE ESTOPPEL.** Nor was plaintiff estopped to claim the land. (Page 553.)

Appeal from District Court, Third District; Hon. M. L. Ritchie, Judge.

Action by Alice E. Moyle against Moroni J. Thomas and another.



In her complaint she gives the dimensions of the parcel of land as follows: 138.9 feet on the south, 91.33 feet on the west, 84.27 feet on the north, and 106.57 feet on the east boundaries thereof; the place of beginning being given as three rods west (being the point marked "a" on the plat) of the southeast corner of lot 1, block 26, plat E, Salt Lake City survey. The defendant Thomas is the owner of the parcel of land marked T on the plat, being a parcel of land  $3 \times 6\frac{1}{2}$  rods. The strip in controversy is the shaded strip marked S-S on the plat. Originally Carl W. Ericzon, deceased, owned the entire south front of lot 1. Before his death, however, he sold the triangular parcel marked E on the plat to his neighbor on the west and purchased from him the triangle on the southwest marked X. This exchange made the decedent's west boundary line due north and south, and it is so designated in some of the deeds hereinafter referred to. The parties to this action deraign title to their respective parcels from the same source, to wit, from the estate of Carl W. Ericzon aforesaid. The facts relating to their respective claims of title, briefly stated, are these:

On June 25, 1889, Carl W. Ericzon aforesaid died intestate. At the time of his death he was seized of the two parcels of land marked M and T, respectively, on the plat, and, it seems, occupied them with his family as one parcel. At his death he left surviving him his widow and four children as his only heirs. One John Nyberg was duly appointed administrator of said estate, and immediately after his appointment made application to the proper court to sell a portion of the parcel of land owned by the deceased to pay the debts of the estate. An order of sale was duly made by the court in which it was ordered that the administrator sell a parcel of land described as follows:

"Commencing at the southeast corner of lot 1, block 26, plat E, Salt Lake City survey, running thence west 3 rods; thence north 32 deg. 15 min. west six and one-half ( $6\frac{1}{2}$ ) rods; thence east 3 rods; thence south 32 deg. 15 min. east six and one-half ( $6\frac{1}{2}$ ) rods to the place of beginning."

It also appears that at or about the time of the sale the defendant Thomas spoke to the attorney for the administrator

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respecting the purchase of the property and suggested that, inasmuch as the location of the boundaries of the land was uncertain, a survey should be made so as to establish such boundaries. It seems that the attorney for the estate spoke to the administrator about the matter, and a competent surveyor was employed to make the survey. Both the defendant, and his wife testified, and they are not disputed in this respect, that the end of the three rods west of the southeast corner of lot 1 was, by the surveyor, placed at the west margin of the shaded strip marked S-S on the plat, and that the defendant Thomas placed a wood screw in the fence running along on the south side to mark the west end of the south boundary, and that the surveyor drove a peg in the ground marking the boundary on the north end. Sale was accordingly made in accordance with the foregoing description and was confirmed by the court on the 1st day of July, 1890. Some time in that year, or in 1891, Mr. Thomas is not certain in which year, he set posts and built a fence along the west margin of the shaded strip as indicated on the plat as and for his west boundary line. After the sale and confirmation thereof as aforesaid, to wit, on the 29th day of September, 1890, the probate court duly made an order of distribution of the remaining portion of said real estate described as follows:

"Parts of lots 1 and 2, block 26, plat E, Salt Lake City survey, commencing at a point 3 rods west from the southeast corner of lot 1 aforesaid; thence west 8.1 rods; thence north 90.7 feet; \* \* \* thence east 76 13/20 feet; thence south 15 min. east, 6½ rods to beginning."

It will be observed that lot 2 is mentioned in the decree of distribution because the triangular strip marked X on the plat is in that lot. The court distributed to the widow an undivided one-third interest and to the four minor children the remaining two-thirds in undivided shares. One of the children subsequently died, and the mother, being the only heir, became the owner of an undivided one-half of the whole of the remainder of the estate. On the 2d day of March, 1895, the mother conveyed her one-half interest by deed to the plaintiff. In the deed from the mother the parcel of land is described as in the decree of distribution, namely, as being 8.1 rods



(133.65) feet on the south boundary, 90.7 feet on the west boundary, 76.65 feet on the north boundary, and 6½ rods (107.25 feet) on the east boundary. On the 18th day of December, 1903, one of the children, a son, conveyed his one-sixth undivided interest in said land to the plaintiff. On June 10, 1905, another son conveyed his one-sixth interest to her, and in September, 1906, the last of the children, a girl, conveyed her one-sixth interest to the plaintiff. In two of these deeds from the children the dimensions of the land are given as 138.9 feet on the south, 91.33 feet on the west, 84.27 feet on the north, and 106.57 feet on the east boundaries, and in the other deed the length on the south is given as 139.9 feet, while all other dimensions are the same as in the deeds of the other two children. All of the deeds, including the one from the mother, have a common starting point, namely, the southeast corner of lot 1, block 26, plat E. Some time in 1898, and before she had acquired the interests of the children, the plaintiff commenced an action in the district court of Salt Lake County against the mother and the minor children aforesaid, and also against the two defendants in this action, to quiet the title and to partition the land described in the decree of distribution aforesaid. In the complaint the dimensions of the parcel of land are given as being 8.1 rods (133.65 feet) on the south boundary, 90.7 feet on the west boundary, 76.65 feet on the north boundary, and 107.25 feet on the east boundary. It is alleged in that complaint that the defendant Thomas claims to be the owner of the east 7 feet of the parcel of land last above described, which claim, it is averred, is without foundation or right. The prayer of the complaint is for a decree quieting the title in plaintiff and for a partition, or, if such cannot be made, then for a sale of the whole and a distribution of the proceeds among the parties in interest. After that action was commenced, as we have shown, the plaintiff purchased the remaining outstanding interests held by the children, and hence there was no further necessity either to sell or to partition in kind. Nothing was done in that action, and the district court, on its own motion, on the 4th day of November, 1911, dismissed it for want of prosecution, and thereafter, on the 4th day of November, 1912, the

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present action was commenced by the plaintiff to quiet the title as before stated. In the complaint in this action the dimensions of the land are, however, given as stated at the opening of this opinion. It will thus be seen that there is a marked discrepancy in the dimensions as given in the present complaint and as they were given in the first complaint, and also as between the decree of distribution and the mother's deed and the present complaint. The point of beginning is, however, the same in both the complaints, in the decree of distribution, and in all of the deeds of conveyance, to wit, three rods west of the southeast corner of lot 1, block 26, plat E, Salt Lake City survey. The whole difficulty in this case arises respecting the precise location of the point designated as the southeast corner of lot 1, block 26, plat E.

The district court, after a consideration of all the evidence upon the question, found as follows:

"That the boundary lines of said block 26, plat E, are irregular and not well determined, and that there are discrepancies as to the position of said boundary lines. That it is not definitely known where the southeast corner of said block was established, prior to the said Kelsey survey, or survey of 1902."

This finding is not questioned by either party. The court further found:

"That there is a great difference in the length of the south side of said block 26 between the block established by the survey known as the survey of 1902 and prior or former surveys, the difference being in one case as high as 17.48 feet."

This finding is likewise not assailed. There were also other surveys after the defendant Thomas had purchased the land, and it seems no two of them agree respecting the location of the southeast corner of lot 1, block 26, plat E. Indeed, the original location of that point, so far as this record discloses, has never been ascertained and fixed, unless it was ascertained by the surveyor employed by the administrator in 1890, when the sale was made to the defendant Thomas. There is, however, no direct evidence in the record that such surveyor found where the original corner was located, none of his field notes, if any were made, having been discovered, and it certainly is

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not shown that any one else has since then discovered it. The district court located the boundary line between the parcels of land in question by dividing the 9.7 feet finally claimed by the plaintiff by giving her 4.7 feet and the defendant 5 feet thereof and entered a decree or judgment accordingly. Both parties appeal, and both assail the findings of fact, conclusions of law, and judgment.

Proceeding to a consideration of plaintiff's appeal first, we find that in truth there is practically no conflict in the material and controlling facts as they are developed by the evidence. While much evidence of a secondary character was introduced by both parties, and much of 1, 2, 3 which under different circumstances in similar cases might be material, yet the evidence that must control here is neither doubtful nor disputed. The evidence respecting the precise amount of land that the deceased Ericzon owned at his death and through whom both parties claim, and the precise amount that was distributed to his widow and heirs, is all documentary and admits of no dispute. Again, in this case we have no such a thing as fixed objects or monuments which are made calls in either the decree of distribution, or in the deeds of conveyance, and to which courses and distances must yield. Indeed, the whole trouble arises from the fact that there is no fixed object or monument to start from unless the southeast corner of said lot 1 may be so called. As we have seen, however, even that is, by the court, found not to be a fixed point, and, since neither party assails that finding, it, for the purposes of this decision, must be taken the same as though the fact were stipulated. There is therefore little, if any, cause for dispute with the court's findings.

The real difficulty arises with the conclusions of law and the judgment. The real thing we must determine, therefore, is whether or not the court's conclusions of law are sound. True, there is one finding which seems to fix the true boundary in question between the two parcels of land. That finding is, however, more in the nature of a conclusion from other facts than a pure finding of fact. We start out therefore with the original starting point, that is, the only one constituting a call in all of the conveyances as well as in the decree of distribu-

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tion, namely, the southeast corner of lot 1, block 26, plat E, as a point not definitely fixed. It appears, however, that in 1902, or about twelve years after the decree of distribution and the administrator's sale to Mr. Thomas, the city engineer attempted to locate and fix that point. It is, however, conceded that it is by no means certain that the point which is now designated as the southeast corner of said lot 1 is at the same place where it was located by the original survey. The claim that the survey of 1902 is really the only survey that was made of the territory in question is clearly disputed by the fact that all former conveyances, as well as the decree of distribution, refer to a former "Salt Lake City survey," which conclusively establishes the fact that there was an original Salt Lake City survey according to which both the decree of distribution and the conveyances were intended to be made. In view of the uncertainty as to just where the original southeast corner of lot 1 was located when the decree, transfers, and conveyances in question were made, we, in order to effectuate the intentions of all concerned, must have recourse to the best evidence which is available. It is clear that immediately after the sale and conveyance to the defendant Thomas was made in June, 1890, and while the whole matter was still fresh in the minds of those whose duty it was to deal with the estate of the deceased Ericson, including the court making the decree of distribution, it was known just what amount of land was left in the estate. The dimensions thereof are specifically given in the decree of distribution. Those dimensions are as follows: 8.1 rods (133.65 feet) along the south boundary, 90.7 feet along the west boundary, 76.65 feet along the north boundary, and  $6\frac{1}{2}$  rods (107.25 feet) along the east boundary. Now, this is precisely the amount of land that plaintiff claimed in her first complaint and is the precise amount in which she purchased a one-half interest from the widow in March, 1895. Although in the deeds from the heirs larger dimensions are given, yet no explanation is made from whom any one or all of them received a larger amount of land than was contained in the decree of distribution, which is the source of their title. In fact, neither of the heirs could convey more than he had, and

therefore the amounts in excess of what they owned as described in their deeds is without any force or effect, at least in so far as this case is concerned.

It is axiomatic that in equity that is certain which can be made so. If therefore we can certainly locate and designate upon the ground the precise amount of land to which the plaintiff is entitled through the conveyance to her, we have arrived at the solution of this case. This, in our judgment, can be done without much difficulty. There seems absolutely no uncertainty respecting the location of plaintiff's west boundary line, either as to courses or distances, or otherwise, as the same was fixed and established by the decree of distribution and as recognized by the court in this case in its findings and conclusions of law. Neither is there any doubt respecting the location of the north or the south boundaries. The only difficulty is with the east boundary, and that arose from the fact that the starting point, namely, the southeast corner of lot 1, always has been, and still seems, left in doubt. If therefore we start on the west boundary line, that is, at the southwest corner of plaintiff's land, and thence run a line east along the south boundary of her land a distance of 133.65 feet (8.1 rods), we determine the precise point where her southeast corner should be located.

The court found that, along the south boundary, the plaintiff, at the time of the trial, was in possession of 129.83 feet. She is therefore short on that boundary the difference between what she is entitled to under the decree and conveyance, namely, 133.65 feet, and 129.83 feet, or 3.82 feet. The court did not find the precise amount of land of which plaintiff is now in possession along the north boundary. Assuming, however, that the difference is the same, namely, 3.82 feet, then her east boundary line and her northeast corner should be moved eastwardly a distance of 3.82 feet from where it now is. In other words, according to the assumption just made, the whole of defendant's west boundary line marked by the fence should be moved east onto his parcel of land a distance of 3.82 feet, and when that is done the plaintiff has in fact precisely the amount of land mentioned in the decree of distribution and the amount she obtained from the widow and the heirs. It is true

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that, as the southeast corner is now located, the defendant Thomas, by this decision, will still have more than three rods in his parcel of ground. This, however, has and can have no effect, either in law or equity, upon the question respecting the amount to which the plaintiff is entitled in this action. As we have seen, the east boundary line of the defendant Thomas' parcel has been a floating one, and, as the court found, is not even now at rest, unless the city has finally permitted it to be so by establishing the west margin of Wall street which bounds Thomas' parcel on the east. For aught that is made to appear, the southeast corner of lot 1 may originally have been located three rods east of where we have determined the southeast corner of plaintiff's land should be. The fact that the city, in making the various changes by the different surveys, has finally left Mr. Thomas more than three rods of ground, does not concern the plaintiff, at least not from a legal or equitable point of view. She is no more interested in that than she would be if in making the various surveys the city had finally succeeded in taking a few feet from the east margin of Mr. Thomas' parcel, and thus had left him with less than three rods. In such event, no doubt, plaintiff would not have consented to move her east boundary line westward so as to give Mr. Thomas his three rods regardless of the effect it would have had on her holdings, and she could not have been required to do so. This is so, because at an administrator's sale the rule of *caveat emptor* applies, and, ordinarily at least, neither title, quality, nor quantity of the estate sold is warranted. 18 Cyc. 826, 827. The plaintiff, as the successor in interest of the widow and the heirs of Carl W. Ericson, could therefore have claimed the precise amount that was awarded by the decree of distribution to her predecessors in interest, regardless of whether Mr. Thomas had his full three rods or not.

In view of all the undisputed facts and circumstances of this case, she cannot now successfully claim more of the estate than was distributed to her predecessors in interest, although, for reasons before stated, Mr. Thomas may now have more land added to his parcel on the east. The plaintiff is therefore entitled to have admeasured to her out of the whole es-

tate of Carl W. Ericzon a parcel of land which is 133.65 feet along the south boundary, 90.7 feet along the west boundary, 76.65 feet along the north boundary, and 107.25 feet along the east boundary. The foregoing distances should be measured from her west boundary as now located on the ground. We remark that the west boundary line in some of the deeds from the heirs is given as 91.33 feet in length. The defendant Thomas has no concern with the length of that boundary line, and for the purposes of this case it is immaterial whether the distance is 90.7 or 91.33 feet. Again, we have assumed that the discrepancy along the north boundary is the same as the one along the south boundary as found by the court. This may not be true. The plaintiff is to have admeasured to her on the north boundary 76.65 feet, regardless of where that distance may end east of Mr. Thomas' present fence line.

It will be noted that the difference between what the district court found and what we have found is not great. Indeed, in value it is quite small and inconsequential. We cannot overlook the fact, however, that the district court proceeded upon an entirely wrong theory or ground in fixing the boundary, and hence we are compelled to correct the error regardless of whether the effect of the error is great or small.

Now a few words regarding the defendant's appeal: The doctrine of an established boundary line, so strongly urged upon us, for obvious reasons, does not apply in this case. The administrator was powerless to establish a boundary line. He, as contended by plaintiff's counsel, could do 4 nothing which would prejudice the rights of the heirs. Had Mr. Ericzon employed the surveyor, and had he acquiesced in the fixing of the boundary line located by Mr. Thomas, the case might be different. The boundary, as fixed by the surveyor, may, however, be regarded as some evidence of where the original corner of lot 1 was located by the original survey. Under the facts and circumstances of this case, however, his location was not binding upon the heirs and is not upon the plaintiff. Besides, that fact, standing alone, is insufficient to justify a finding that the surveyor employed by the administrator in fact found the original corner, although he may have done so. Again, if the plaintiff had

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acquiesced in the boundary line as it was located by Mr. Thomas until 1912 when she commenced this action, the case might again be different. She, however, did not acquiesce in the fence line for any great length of time. She acquired the one-half interest in the estate in March, 1895, and in 1898, a little more than 3½ years thereafter, she brought her action disputing the fence line as the boundary. It is unimportant what legal effect be given to that action otherwise, since it clearly is sufficient to show that she disputed the boundary as marked by the fence. Before she acquired an interest in the estate, the heirs were minors, and hence could not consent to the location of the boundary line. There was therefore no boundary line established, either by express agreement, survey, by acquiescence, or otherwise. That question therefore is out of the case.

Neither is there any merit in the claim of adverse possession, nor to that of the statute of limitations or estoppel. The reasons for these conclusions are so obvious 5, 6, that we shall not state them.

It follows therefore that the appeal of the plaintiff must entirely fail, while that of the defendant must fail except to the extent that the findings should be, and the conclusions of law and the decree are hereby, modified. In view that the findings of fact are very voluminous and contain both findings of evidentiary facts and conclusions of law, they perhaps should be redrafted to conform to the views herein expressed.

In conclusion we remark that, if the parties cannot agree upon a practical location of the east boundary line of the plaintiff's parcel of land as we have determined the same, then the district court is directed to appoint a commissioner and direct him to locate said boundary line and to properly mark the same upon the ground in accordance with the directions herein contained. The district court is further directed to require the defendant Thomas to remove his fence which he claims now marks the westerly boundary line of his parcel of ground to the line as we have herein indicated the same and as the same may be marked upon the ground by the commissioner if one be appointed; said fence to be moved within a reasonable time to be fixed by the court. In case said Thomas



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has any trees or buildings on said strip, he should also be required to move those. The expenses of said commissioner, if one be appointed, shall be fixed by the district court, and both parties shall pay an equal proportion thereof.

The findings of fact, conclusions of law, and decree, are therefore modified as herein indicated, and the cause is remanded to the district court, with directions to modify said findings of fact and conclusions of law as herein indicated, and to modify the judgment or decree in the particulars stated, and to enforce the same as modified; further, to adjust the costs, except as herein otherwise stated, as to the court may seem just. Neither party to recover costs on this appeal.

STRAUP, C. J., and McCARTY, J., concur.

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PARK CITY v. DANIELS.

No. 2753. Decided August 4, 1915 (149 Pac. 1094).

1. LICENSES—CONSTITUTIONALITY OF ORDINANCE—UNIFORMITY. A city ordinance requiring by subdivision "a" a license fee of one hundred dollars per year, payable in advance, to peddle or take orders for any fresh meat or any goods, wares, or merchandise of a general character, or for teas, coffees, spices, extracts, clothing, dresses, knit goods, or underwear, by subdivision "b" a fee of seven dollars and fifty cents per quarter for peddling or taking orders for any or all kinds of fruit, vegetables, farm or dairy products, fish or poultry, and by subdivision "c" a license fee of seven dollars per quarter or three dollars per month for taking orders for any literature, music, or small articles for household use or ornament manufactured by the peddler, is in violation of Comp. Laws 1907, Sec. 206, subd. 87, providing that all license fees and taxes shall be uniform in respect to the class upon which they are imposed, as discriminating against those who may peddle or solicit any of the articles mentioned in subdivision "a" and in favor of those peddling articles mentioned in the other two subdivisions of the ordinance. (Page 559.)
2. LICENSES—CONSTITUTIONALITY OF ORDINANCE—UNIFORMITY. A city ordinance, requiring a license fee for peddling or selling certain provisions, articles of general merchandise, and articles for household use, violates Comp. Laws 1907, Sec. 206, subd. 87,

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requiring all such fees to be uniform in respect to the class upon which they are imposed, in discriminating in favor of the local merchants of the city engaged in selling the same articles. (Page 560.)

3. LICENSES—CONSTITUTIONALITY OF ORDINANCE—UNIFORMITY. While city authorities may impose license and occupation taxes, and may make reasonable classifications for such purposes, such fees and taxes must, under the express terms of Comp. Laws 1907, Sec. 206, subd. 87, be uniform in respect to the class upon which they are imposed.<sup>1</sup> (Page 560.)
4. LICENSES—CONSTITUTIONALITY OF ORDINANCE—UNIFORMITY—UNCERTAINTY OF TERMS. A city ordinance, requiring a one hundred dollar license fee for peddling "wares and merchandise of a general character" and a fee of seven dollars a quarter for peddling "small articles for household use," is discriminatory because of the uncertainty of its terms, since the same articles might be construed to be included within the ordinance by one court or jury and to be excluded by another. (Page 561.)

Appeal from District Court, Third District; Hon. *F. C. Loofbourow*, Judge.

Clifford Daniels was convicted in the Justice's Court of peddling without a license, contrary to ordinance.

Judgment of conviction entered on appeal to the District Court. Defendant appeals.

REVERSED and REMANDED, with directions.

*Stockman and Horace H. Smith*, for appellant.

*Evans, Evans and Folland* for respondent.

#### APPELLANT'S POINTS.

An ordinance passed under the police power is not subject to the same test of equality or uniformity that is required of a revenue measure. The ordinance in question cannot be justi-

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<sup>1</sup>*Salt Lake City v. Christensen Co.*, 34 Utah 38; 95 Pac. 523; 17 L. R. A. (N. S.) 898; *State v. Bayer*, 34 Utah 266; 97 Pac. 129; 19 L. R. A. (N. S.) 297; *Salt Lake City v. Utah L. & Ry. Co.*, 45 Utah 50; 142 Pac. 1067.

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fied as a police regulation and as it makes an arbitrary and illegal distinction between the persons and things to which it relates, it cannot be sustained as a revenue measure. (*State v. Bayer*, 34 Utah 257, 97 Pac. 129, 19 L. R. A. N. S. 297; *State ex rel. Mudeking v. Parr*, 123 N. W. 408, 109 Minn. 147; *Jewel Tea Co. v. Lee's Summit*, 189 Fed. 280; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 351, 48 L. R. A. 270; *State v. Wright*, 53 Ore. 344, 100 Pac. 296, 21 L. R. A. N. S. 349; Gray, Limitations on Taxing Power, 1408, 1438.) Classification for license tax purposes must be based upon some reasonable ground of difference, and the license imposed must operate uniformly upon all who are "engaged in the same business in the same territory and under the same conditions." No reasonable ground of difference exists for imposing a license tax of \$100 a year, payable in advance, upon a person selling teas, coffees, spices and extracts, and the imposing of a lesser amount upon other occupations, without reference to any difference in the nature of the business or the character or amount of goods sold. (*Salt Lake City v. Utah Light & Ry. Co.*, 45 Utah, 50, 142 Pac. 1067; *State v. Wright*, 53 Ore. 344, 100 Pac. 296, 21 L. R. A. (N. S.) 349; *Siciliano v. Neptune Township*, 83 Atl. 865, 83 N. J. Law 158; *State ex rel. Mudeking v. Parr*, *supra*.) A license cannot be required to permit a person to carry on a lawful and harmless calling which he has the natural and inalienable right to pursue. (*Mathews v. Jensen*, 21 Utah 207, 61 Pac. 303.) A municipality cannot discriminate in favor of local merchants by singling out and arbitrarily taxing the sale of certain articles in a certain manner. (*State v. Bayer*, *supra*; *Allport v. Murphy*, 116 N. W. 1070, 153 Mich. 486; *Hewson v. Englewood*, 55 N. J. Law 522, 27 Atl. 904, 21 L. R. A. 736; *State v. Wells*, 69 N. H. 424, 48 L. R. A. 99, 45 Atl. 143; *Iowa City v. Glassman*, 136 N. W. 901, 155 Iowa 671; *State ex rel. Mudeking v. Parr*, *supra*.) The tax imposed is an interference with and a burden upon interstate commerce. The act of soliciting orders for a non-resident principal is not subject to tax as a local privilege. (*Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694; *Asher v. Texas*, 128 U. S. 129, 32 L. Ed. 368; *McCall v. California*, 136 U. S. 104, 38 L. Ed. 391; *Brennan v. Titus-*

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ville, 153 U. S. 289, 38 L. Ed. 719; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. Ed. 295; *Dozier v. Alabama*, 218 U. S. 124, 54 L. Ed. 965; *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. Ed. 565; *Stewart v. Michigan*, 232 U. S. 665, 58 L. Ed. 786; *Jewel Tea Co. v. Lee's Summit*, 189 Fed. 280; *Grand Union Tea Co. v. Evans, et al.*, 216 Fed. 791.)

## RESPONDENT'S POINTS.

In reviewing questions involving the reasonableness of the rate imposed upon a certain occupation or business, the court ought not, merely by making comparisons between the rate charged in the particular case and those fixed for other lines of business, presume that the particular rate is excessive, merely by reason of such comparisons; but the presumption should be, and under the authorities it undoubtedly is, that a license is presumed to be reasonable unless the contrary appears on the face of the ordinance itself, or is established by proper evidence. (*Van Ballen v. People*, 40 Mich. 258; *Ogden City v. Crossman*, 17 Utah 66; *Southern Car, etc., Co. v. State*, 133 Ala. 624; 32 Southern 235; *John Rap & Son v. Kiel* (Cal.), 115 Pac. 651; *Kinsley v. Chicago*, 124 Ill. 359; 16 N. E. 260; *Burlington v. Putnam Ins. Co.*, 31 Iowa 102; *In re Martin*, 62 Kan. 638; 64 Pac. 43; *Mason v. Lancaster*, 4 Bush. (Ky.) 406; *Mason v. Cumberland*, 92 Md. 451; 48 Atl. 136; *People v. Grant*, 157 Mich. 24; 121 N. W. 300; *St. Paul v. Colter*, 12 Minn. 41; 90 Am. Dec. 278; *Springfield v. Jacobs*, 101 Mo. App. 339; 73 S. W. 1097.)

## FRICK, J.

The defendant Daniels, hereinafter called "appellant," in May, 1913, was charged in the justice court of Park City, Summit County, Utah, with having, within the corporate limits of said city, "willfully and unlawfully engaged in the business or occupation of selling, offering for sale, soliciting and taking orders for goods, wares and merchandise, teas, coffees, spices and extracts without first having taken out and obtained

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a license," contrary to the ordinances of said city. The particular sections of the ordinance relied on were pleaded. The appellant was convicted in the justice court and appealed from that judgment to the District Court of Summit County, where he was again convicted. He appeals to this court under article 8, section 9, of our Constitution, which permits an appeal to this court from judgments rendered in justice courts only when "the validity or constitutionality of a statute" is assailed. This court has held, however, that the term "statute" includes municipal ordinances. The only question we can consider, therefore, is the validity of the ordinance in question.

One ground upon which the ordinance is assailed is that it is discriminatory; that is, that it does not affect all of the same class alike. The particular part of the ordinance in question reads as follows:

"Licenses to peddle, sell, offer for sale, barter or exchange, to canvass, solicit or take orders for any goods, wares or merchandise, garden, farm or dairy products, fruit, eggs, poultry, fish or game, at retail, may be issued upon payment in advance of the following sums: (a) To peddle, sell, offer for sale, barter or exchange, to canvass or solicit, or to take orders for any fresh meat, or any goods, wares or merchandise, of a general character, or for teas, coffees, spices, extracts, clothing, dresses, knit goods or underwear, either with a team or on foot, one hundred dollars per year. (b) To peddle, sell, offer for sale, barter or exchange, or to canvass, solicit or take orders for any or all kinds of fruit, vegetables, farm or dairy products, fish or poultry, without or with a team or vehicle to deliver the same, seven dollars and fifty cents per quarter. (c) To peddle, sell, offer for sale, barter or exchange, or to canvass, solicit or take orders for any literature, music, small articles for household use or ornament, manufactured in whole or in part by the person so peddling, selling, offering for sale or soliciting or taking orders for such article, seven dollars per quarter or three dollars per month."

Appellant was convicted of having violated the provisions of the ordinance contained in the subdivision marked "a." There are also taxes imposed on other occupations and busi-

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ness as follows: On all stocks of merchandise of \$20,000 or over there was a quarterly tax of thirty dollars; on all stocks of merchandise of the value of \$5,000 and under \$20,000, fifteen dollars; on all stocks of merchandise of the value of \$1,000 and less than \$5,000, seven dollars and fifty cents; and upon all stocks of merchandise of less than \$1,000, four dollars, payable quarterly. There were also license taxes imposed on other occupations, but those are not material here.

It will be observed that subdivision "a," under which appellant was convicted, includes all who sell, offer for sale, or take orders for "fresh meat, or any goods, wares or merchandise of a general character, or for teas, coffees, spices, extracts, clothing, dresses, knit goods or underwear, either with a team or on foot." These are taxed at the rate of one hundred dollars a year payable in advance. It will also be noticed that each and every one of the foregoing 1 articles are not only perfectly harmless, but are such as are used in all households, and therefore cannot require special police protection or regulation. The same may be said with regard to the articles mentioned in subdivisions "b" and "c," with the exception, perhaps, that the articles mentioned in those two subdivisions, or at least some of them, are not in such constant demand or use as are those in subdivision "a." There is, however, no apparent reason why a person should be required to pay one hundred dollars a year in advance for the right to sell or solicit orders for "fresh meat," while he may sell all kinds of fish, poultry, and farm and dairy products for seven dollars and fifty cents a quarter payable quarterly. Again, why should one person be required to pay one hundred dollars a year in advance for selling tea and coffee, while he may sell any one or all of the other things enumerated in subdivision "b" by paying seven dollars and fifty cents four times a year? Is it not manifest that all those who may sell, offer for sale or solicit orders, etc., whether for the articles enumerated in subdivision "a" or any of them or those mentioned in the other subdivisions, are all engaged in the same occupation or calling, namely, selling or soliciting orders for the sale of articles of ordinary merchandise? Is it not equally manifest that a person may, with his team and wagon, sell

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and deliver quite as much in any given time of the articles enumerated in subdivision "b" as he can of those mentioned in subdivision "a"? Whether that be so or not, however, are they not all engaged in peddling or in attempting to sell, or in selling or in taking orders for the sale of ordinary articles of merchandise or household goods? Again, is it not patent to all that there is a clear discrimination against those who may solicit or sell any of the articles mentioned in subdivision "a" and in favor of those who may solicit orders for or sell any of the articles enumerated in the other two subdivisions of the ordinance in question?

Moreover, does it require any argument to show that the discrimination is also in favor of the local merchants in Park City who thus practically escape from all competition from that source? Further, can it reasonably be contended that the difference in the tax between subdivision "a" 2 and the other two subdivisions, "b" and "c," is a fair and reasonable one? Why demand the whole \$100 under subdivision "a" in advance, while under the other two subdivisions the tax is made payable quarterly only? Can it be for any other purpose than to prohibit the sale of all the articles mentioned in subdivision "a" and to permit the sale of those mentioned in the other subdivisions? Would not the enforcement of subdivision "a" have that effect? Indeed, could it have any other?

While the city authorities of the cities of this state may impose license or occupation taxes, and for that purpose may make reasonable classifications, yet the 3 statute conferring the power (Comp. Laws 1907, section 206, subd. 87) in express terms also provides the manner of the imposition of such taxes in the following words:

"All such license fees and taxes shall be uniform in respect to the class upon which they are imposed."

The very statute, therefore, which grants the power, also imposes the condition of uniformity. In *Salt Lake City v. Christensen Co.*, 34 Utah, 38, 95 Pac. 523, 17 L. R. A. (N. S.) 898, we held that it is proper to classify stocks of merchandise or occupations for the purpose of arriving at uniformity. In *State v. Bayer*, 34 Utah, page 266, 97 Pac. 129, 19 L. R. A.

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(N. S.) 297, in referring to statutes imposing such taxes, Mr. Justice Straup said:

"It is essential, however, to the constitutionality of such statutes, that the tax apply equally to all persons of a given class and is uniform and equal."

We enforced that rule in *Salt Lake City v. Utah L. & Ry. Co.*, 45 Utah 50, 142 Pac. 1067, where we held a certain ordinance invalid because it was discriminatory. The rule adopted by this court is the rule that is generally enforced by the courts of last resort. In *2 McQuillan, Mun. Corps.*, section 738, the author states the law upon this subject thus:

"The discriminations which are open to objection (lack of uniformity) are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions."

In Gray's Limitations of Taxing Power, section 1441, many concrete instances are given where statutes and ordinances have been held discriminatory and void. The following, among a large number of cases that might be cited, hold that ordinances similar to the one in question here are discriminatory and void: *State v. Wright*, 53 Or. 344, 100 Pac. 296, 21 L. R. A. (N. S.) 349; *State v. Parr*, 109 Minn. 147, 123 N. W. 408, 134 Am. St. Rep. 759; *Siciliano v. Neptune Township*, 83 N. J. Law, 158, 83 Atl. 865. A mere cursory reading of the foregoing cases will show that the discrimination of the ordinance in question is more pronounced than was the case in any of the cases cited.

Again, an examination of the language on subdivision "a," as well as in the other two subdivisions, shows that it is very loose and uncertain. "Wares and merchandise of a general character" may be expanded or restricted almost at pleasure. One court or jury might include, while another might exclude, the same article or any number of articles. 4 Again, what is meant by "small articles for household use" is quite indefinite. The same articles might therefore be included in one case and excluded in another, which, in and of itself, might tend to bring about discrimination and inequality to a certain extent.



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The ordinance is also assailed upon the ground that it interferes with interstate commerce. That question is, however, not properly before us in view of the condition of the record, and hence we express no opinion upon it.

For the reasons stated, the judgment is reversed, and the cause is remanded to the District Court of Summit County, with directions to grant a new trial and to dispose of the case in accordance with the views herein expressed; appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

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GIBSON v. UTAH LIGHT & TRACTION CO.

No. 2750. Decided August 4, 1915 (151 Pac. 76).

1. STREET RAILROADS—PERSONAL INJURY—QUESTIONS FOR JURY—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE. On evidence in an action for personal injury from a collision with defendant's street car while crossing the tracks at a street intersection, alleging negligence in running the car at an excessive speed, and in failing to give warning signals, *held*, that the questions of plaintiff's contributory negligence and defendant's negligence as the proximate cause of the injury were for the jury.<sup>1</sup> (Page 573.)
2. STREET RAILROADS—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE. The same degree of care is not imposed upon a pedestrian attempting to cross an ordinary street car track that is imposed on him in attempting to cross a steam railroad track. (Page 573.)
3. STREET RAILROADS—OPERATION—CARE REQUIRED. While a street railroad has a preferential right of passage along and over its car tracks to which all others must yield, yet the street car operatives and a traveler must reciprocally exercise ordinary care to avoid injury.<sup>2</sup> (Page 573.)

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<sup>1</sup>*Wilkinson v. Railroad*, 35 Utah 110; 99 Pac. 466; *Pratt v. Light & Ry. Co.*, 38 Utah 500; 113 Pac. 1032; *Oswald v. Light & Ry. Co.*, 39 Utah 245; 117 Pac. 46.

<sup>2</sup>*Spiking v. Railway & P. Co.*, 33 Utah, 313; 93 Pac. 838.

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4. **STREET RAILROADS—CONTRIBUTORY NEGLIGENCE—STOPPING AND LISTENING.** A traveler is not required either to stop and listen or to specially look for an approaching street car, though bound to exercise ordinary care for his own safety in crossing a street car track. (Page 574.)
5. **STREET RAILROADS—PERSONAL INJURY—NEGLIGENCE—LAST CLEAR CHANCE.** Where plaintiff crossing defendant's street car track did not exercise the required degree of care, defendant had no right to run him down, if by ordinary care it could have avoided doing so after discovering his inattention or peril. (Page 574.)
6. **NEGLIGENCE—PROXIMATE CAUSE.** The negligence of either party is operative only when it constitutes the proximate cause of the injury or damage complained of, and if it is merely the remote cause the law regards it as inoperative and inconsequential. (Page 575.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Samuel Gibson against the Utah Light & Traction Company.

Judgment for plaintiff. Defendant appeals.

**AFFIRMED.**

*P. L. Williams, George H. Smith, J. V. Lyle, and Paul Williams*, for appellant.

*Thomas Marioneaux and Willard Hanson*, for respondent.

**FRICK, J.**

The plaintiff brought this action to recover damages for personal injuries which he alleged he suffered through the negligence of the defendant. The plaintiff, after stating that the defendant owned and operated an electric street car system in Salt Lake City, in substance alleged that on the 3d day of March, 1914, while "in the exercise of due care," he was crossing the intersection of certain streets in Salt Lake City, the defendant carelessly and negligently operated a street car

at an unlawful and excessive rate of speed, to wit, in excess of twenty miles an hour, and also carelessly and negligently failed to give any warning signals in approaching the street intersection aforesaid, and carelessly and negligently ran said car so that it struck the plaintiff with great violence while he was in the act of crossing the defendant's street car tracks on said intersection, and that by reason of being struck as aforesaid he sustained serious and permanent injuries about his body. The plaintiff also pleaded the city ordinances in which the speed limit for street cars was fixed at twelve miles an hour, and in which it was also provided that all street cars must be equipped with gong bells or whistles, which must be rung or sounded as provided in said ordinances in approaching street crossings. The defendant answered the complaint denying all acts of negligence and pleaded contributory negligence on the part of the plaintiff. When the plaintiff had rested his case, the defendant moved for a nonsuit. The motion was denied by the court, and defendant excepted. The case was submitted to the jury upon all the evidence, and they returned a verdict for the plaintiff, upon which judgment was duly entered. The defendant appeals from that judgment.

In appellant's brief counsel state the proposition submitted for decision thus:

"The action of the trial court in overruling the defendant's motion for a nonsuit is the sole ground upon which this defendant relies for a reversal in this case."

This requires us to state plaintiff's evidence somewhat at length. So far as possible, we shall follow appellant's printed abstract of the evidence. We do this because, after examining the original bill of exceptions, we find that appellant's counsel have fully and fairly abstracted the evidence upon which they rely for a reversal.

According to the printed abstract, plaintiff, in respect to the accident, testified in chief as follows:

"My name is Samuel Gibson. I am seventy-seven years old. My birthday is on June 18th. I was seventy-seven in June. I have lived in the city here for nine years now. I was in the city last March when this accident occurred. It occurred on the 3d

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day of March. It was in the evening, just about dark. I was going out to Mr. Powell's. He is an old friend of mine, and we were together. When I reached the corner of First West street, I went across the street to get some tobacco and did not like the tobacco, and came out of that and came across the street over to the hotel there, and he went in and got some tobacco and then went on down the street, put tobacco in our pipes, and stopped to light our pipes, and we were going across the street next block. That was crossing First West street, First West street and First South street. He (Mr. Powell) went a little bit ahead of me, and I started on to walk fast to get up with him on the other side, and he got ahead of me, and I went across the first line of tracks, and just stepped right about the middle of the other track, and that bell rang right behind me, right alongside of me. I did not have time to look one way or the other. I did not know how to get out of that; but I was quickly put out. I was quickly knocked out. I stopped right in the track. I never heard a thing until I heard the crash of that bell. The bell that I heard was the sound of the bell on the street car. It was on the car because the car was making the noise. It sounded like a bell ringing. When I heard that, I stood right about the middle of the track that the car was on. The car was going down the street. That would be going west, and when I saw it I tried to get either one way or the other and broke me up so I lost half my senses, I guess, until it hit me. Then it put me off. The car hit me. It knocked me unconscious. I lost my senses. It hit me somewhere right on the back of the head, and in my ribs here, and in my back and in here."

On cross-examination he said:

"I have been in Salt Lake about nine years. This injury happened on First South street, down on First South street and First West, and that is a distance of about three blocks from Main street. I know where Main street is. It is two blocks. And Main street is the principal business street in the city, and the place where I was injured was about two blocks from that street. \* \* \* The day of the accident, I went across one track and went to cross the other, just

happened to stop. Stopped right in the middle of that track, and this come right onto me, and I just heard the crash of the bell. That was the first thing I knew of the approach of the car. I didn't have time to look to see whether it was coming before that. While I was walking across the street there, I didn't look up First South to see whether a car was coming. I never thought of it, never thought of it until I heard the bell. The first thing I knew of the approach of the car was when I was standing in the middle of the north track and heard the bell ring. It was right on me then. Before stepping on the north track, I hadn't looked up to see if a car was coming, because I thought I was clear. The thought of a car did not enter my mind before that time. It entered very quick after. I was just a little hard of hearing in one ear at the time of the accident, not a great deal."

On re-direct he testified as follows:

"I didn't hear the bell when I stopped, but just went to move, and I heard the bell. Then just turned around like that, and the car was right on me. I didn't stop on the track no time hardly at all, come that quick, come right onto me. I just stopped there to see Mr. Powell, went down to that corner, or went up this sidewalk here. Just stopped to get my directions; that is just what I happened to stop. Just as quick as you could think. I heard that bell, but I could not get that way or get this way until it hit me. I started to go across this way to the coner. I saw Mr. Powell over there and started to go that way, and the bell come in that quick on me, and the car."

Mr. Walls, on direct examination, testified as follows:

"I remember that an accident occurred on the street car. I could not tell you what day it was; it was a long while since. I remember a man that got hurt with the car. This is the gentleman, Mr. Gibson, the plaintiff in the case. I could not tell you the time either. It was light. The sun hadn't gone down. It was in the afternoon. I stood at the gate, and I saw that man same as he was paralyzed in my estimation, did not know whether to go across the track or stay back, and at last he made a motion to go across, and the car struck him. When I first saw the plaintiff, Mr. Gibson, he was going away

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from the Fourteenth Ward Chapel and going on that side of the road from the Fourteenth Ward Chapel, going across. \* \* \* He was crossing the street. I saw him crossing the street until he got—there was a pole somewhere about here, and he just got to the pole. No, he hadn't got past the pole; he got up to the pole when the car hit him. He was on the street car track then, and the car hit him, of course. I didn't see him until he came to the corner; from that time I saw him. He was walking across the street. He was walking somewhere on the diagonal from one street to the other in that direction. He got on the far track when the car hit him, that would be the north track, and he kept going right along. When he got to the street car track, he seemed to stop back a little bit, and then made a bit of a push. That is when he got on the street car track. The car was almost on him at that time. I heard a bell; I never heard the bell ring until, in my estimation, it must have struck him. I never heard the bell ring until it struck him. You see I live here, and here is the car. I never heard the bell ring before it got past this place here. I never heard it ring until it got past my line of vision, and then it would be practically upon him. I didn't hear any gong sound. I wouldn't say the gong didn't sound; I heard the bell. I heard a sound; I know it was something sounding. That noise was made when he was on the track and did not know whether to go across or back backwards. That was practically at the same time the car hit him and knocked him on the right-hand side of the road. That is all I saw of it. I saw the car as it came just before it hit him and just as it hit him and as it passed him."

On cross-examination he testified as follows:

"I noticed the car running across the billboard, and I saw the car coming down. The billboards are on the corner, and all the view I got of the car was from the time it passed the billboards until it got to the middle of the road. With that view of it I am able to judge the speed it was going. I judge it was going fourteen or fifteen miles an hour. Might have been more; might have been less."

Mr. Powell, a witness for the plaintiff, testified on direct examination as follows:

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"My name is James Powell. \* \* \* I am acquainted with Mr. Gibson. I have known him quite a while, a number of years. I was present at the accident to Mr. Gibson. \* \* \* We went to the corner, and we got pretty near to this side of the corner. The corner is vacant, house stands back, and there is a tailor shop there, and Mr. Gibson says, 'I am going to light my pipe.' I walked down and kind of catacorned across, and I heard the bells and looked around— Zip! There was the old man throwed around dead. I said he was. I got back there as quick as I could, and there was people all come out. I do not know what time of day the accident occurred. I didn't see no time or anything; perhaps six o'clock or somewheres. It was in the evening. \* \* \* I got near the opposite corner. Then I heard the noise, looked around, and there was the poor old man. The noise was the bell as hard as they could ring on the street car. The old man was up in the air just when I looked around, and down he went. I had not heard the bell ring before that. I hadn't heard anything. He was just going to light his pipe and follow me across, and little did I think. I turned around and looked when I heard the bell. At that time he had been struck, was being thrown by the street car. I never noticed the gong only right at the time I heard it and looked around and seen the man dead. At that time it was going west. After the car hit him, it stopped, after it got about a third of a block down. I looked for the number, and it was out of my reach. Then I went back to the poor old man to see how he was. The car looked like it went about a third of a block to me; that is, of the next block. It went past the corner down the block."

On cross-examination he testified:

"After I went ahead of him, I walked down across the street; that is, zigzag across. Then it was I heard the sound of the gong, and I looked around and he was up and back. He had not stopped in the middle of the street car track to light his pipe. He had stopped up at the front of this, stopped at the brick, at the sidewalk. So I don't know whether he stopped on the middle of the track or not. I walked down and heard the bell and looked around; he was up in the air.

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I say I heard it then, and looked around and seen him up in the air. That is all the bell I heard. Then I went directly back to him as quickly as I could. I looked to catch the number of the car, but I was after him more."

Mr. Jewett, another witness called on behalf of the plaintiff, on direct examination testified as follows:

"My name is A. K. Jewett. I reside in Salt Lake City. I am a conductor on the Denver & Rio Grande running out of Salt Lake. I have been railroading about twelve years in different branches, in the operating service; that is, either as conductor, brakeman, or similar work. I was in Salt Lake the day of the accident to Mr. Gibson. I saw the accident. I was going from my boarding house about two doors north of this corner where the accident happened, and as I turned the corner I observed the street car coming at a fast rate of speed, and what attracted my attention first was the wheels sliding on the car. I being working on the railroad and familiar with the sliding of the wheel, that will attract our attention quicker than anything else. It was about two car lengths distant. Mr. Gibson started across the track, and I observed it was about a car length from him when I heard the whistle and bell ring at the same time. He struck the old gentleman; knocked him, I should judge, about forty feet. When the car got stopped, it was about three or four car lengths by where they first struck the old gentleman. I think the bell started to ring or the gong sounded or the whistle blew about a car length from Mr. Gibson. I was looking at it and watching it. I do not know whether it rang before that or not. I didn't hear it. If it had rung, I think I would have heard it. I didn't hear it. I was looking at it in a position where I could hear if it did ring. When I say that the bell rang, or the gong sounded, that is the same thing. None of these noises were made until this time, so far as I heard. When I say a car length, I mean about the length of the street car, twenty-eight or thirty feet. When I say it was going fast, I mean from the rate of speed it was going, it was going about — I am a train conductor and have been a brakeman for about eight years. All that time on railroad trains, and I had occasion to observe the speed of trains a



good deal, and note them. I have been off them and on them and observed the time they were going. Not only trains, but other vehicles. I am able from my experience to judge the cars and trains that move by me, the speed they are approximately making. From my experience I would say the speed of the car at the time it struck Mr. Gibson was from twenty-five to thirty miles an hour. Immediately upon the car striking him, I ran to the old man. It knocked him towards me, about ten or twelve feet from me. I started to raise him up. It looked to me as though he was dead. He kind of gasped when I started to pick him up, laid him down, and ran to the telephone at the boarding house where I had just come from, couple of doors away, and telephoned for the police ambulance. \* \* \* When I first saw Mr. Gibson, it was just before he started to cross the track. He was walking straight ahead, walking all the time. At the time the car struck him, he was still walking, and I thought the step caught him on the north side of the car. I think he was pretty near over the track. It was going so fast I could not tell. Could not tell what part of the car struck him. The neighborhood where this accident occurred, First West and that immediate vicinity, is a thickly settled part of the city. There is a hotel and business house across the street, mostly residences around there close. There was a terrace there, I forget what they call it, on First West. There are poles in the center of the crossing there."

On cross-examination he further testified as follows:

"I think it was about 6:15 when this accident happened, around about that. Around about six, anyhow. I had just come from my boarding house. I was on the west side of First West street, on the side towards the depot. I was going to the Colonial Hotel at that time. That is on the north side of First South street, about a block or a half a block from there. I was not with anybody at that time. The wheels sliding on the car was what first attracted my attention to Mr. Gibson. Before that I had not been paying particular attention to the approaching car, or anything about it. When I heard the wheels sliding and looked up, I think the car was about the length of the car east of the crossing. That is where the side-

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walk crossing would be. Then it was east of the east crosswalk when the wheels started to slide. Before that time I had not heard the bell ring, and had not paid any attention. So I am not in a position to say whether it did or not. I am not in a position to say whether the whistle blew or not before that time. I saw Mr. Gibson walking directly over in front of the car before the car got to him; that is, he was crossing the street from the southeast to the northwest. He was walking across the street, but he would have plenty of time to get over if the car had been running at an ordinary rate of speed. But he walked across the street. He walked right on the track, and when he got about the north rail he was struck by the car. I didn't see him stop at all. He kept right on walking. There was no other car around there at that time. There were no automobiles or carriages that I saw. I do not think that there was anything else to distract his attention except the car coming from the east at that time. \* \* \*

The distance in which a car can be stopped depends on the rate of speed they are going, how heavily they are loaded. Supposing the car was going down the grade there at the rate of twelve miles an hour, it would stop in ten feet or less; stop in eight feet. You can stop a car going twelve miles an hour in a distance of eight feet. Just a slight downgrade there, a water grade. \* \* \*

I base my opinion that a car can be stopped in about ten feet, going twelve miles an hour, on the practical experience I have had on the railroad. The difference is this: A railroad man or anybody knows these street cars have what is called the straight air. That is much quicker than the automatic air. On a steam road the air works automatically. You take it out to set the brake. The street cars will take hold quicker than the automatic will. I never operated a street car. \* \* \*

The car went three or four car lengths after it struck Mr. Gibson. When the car stopped, it was by the crossing, I should judge; that is, the west crosswalk. Probably twice its length by the crossing. It was by the crossing quite a bit. I did not take particular attention to notice right exactly where it stood. Mr. Gibson was about three car lengths from the back platform when the car had stopped. From the position in which he was lying

there it would be about three car lengths to the back platform of the car that struck him. When the bell first started ringing, I was about a car length away. He was walking with his back rather towards the car. He was walking. He would hardly have time to get off the track after that bell. \* \* \* I couldn't say whether he had looked to see whether it was coming. I hadn't paid any attention. I didn't see him look. He was in the act of stepping over the track as I observed the wheels sliding on the car. I looked to see what the trouble was and noticed him step on the track going across the track on the other side, and the car was about two car lengths away from him at that time. He was just starting over the south rail at that time. At the time he was starting over the south rail, the car was about two car lengths away; that is, the south rail of the north track. \* \* \* From the place where he was struck to the rear platform was about three car lengths. Then when I testified before that from the position in which he was lying to the rear platform was three car lengths, I meant the car was about three car lengths from where it struck him. I don't believe I understood your question before. If I testified that way I did not. I know where the pole is with reference to that intersection there. He was about half way between the east crossing and that pole that stands in the center when the car struck him. So that he would be about half way between the center of the street and the east crossing. He was between the east crossing and the center of the street. At the time he went upon the south-rail there, the car was about three car lengths away from him. It was then the wheels were slipping. That being so, the wheels were locked; the air going into emergency. That would be the motorman's last move, would be to throw the car into emergency. The next thing would be to get off. All that he could do after that was to get off."

We have given the testimony of the last witness practically in full, since he was in a position to observe the accident and apparently possessed the requisite knowledge and experience to state his observations intelligently and clearly. Besides, in view of his experience, his testimony respecting speed and movement of the car could have been regarded by the jury

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as reliable. There is considerable more testimony; but it really is a mere restatement in different form of the circumstances already stated, with the exception of the nature of the injuries and the physical condition of the plaintiff, neither of which is material here.

It is contended that, in view of the foregoing evidence, plaintiff was guilty of negligence as matter of law, and hence the court erred in denying the motion for a nonsuit. The writer desires to state that at first blush he was impressed that, under plaintiff's own admissions, he did not give the matter of the approaching street car any thought or attention, that he was guilty of negligence which 1, 2, 3 directly contributed to the accident, and hence he could not recover. Upon more mature reflection, however, I was compelled to modify my first impressions. As I now view the matter, plaintiff's conduct, even though it were conceded to have been negligent—nevertheless the jury were authorized to find that it did not constitute the proximate cause of the accident. True it is that, if the plaintiff had timely stopped and looked, or had stopped and listened before going on the track, he would, in all probability, have discovered the approaching car, and would thus have permitted it to pass him, and hence would have avoided the collision. If the plaintiff, under the same circumstances, and in view of his admissions, had gone onto a steam railroad track in front of an approaching train or engine, it might well be held, as we held in *Wilkinson v. Railroad*, 35 Utah, 110, 99 Pac. 466, that he was guilty of negligence preventing a recovery as a matter of law. Again, if the plaintiff had gone onto a street car track in front of an approaching car at night at a place where it was dark so that he could not have been seen approaching the car track by the operator of the car, and when he could easily have seen the approaching car, and where people did not habitually cross the track, as was the case in *Pratt v. Light & Ry. Co.*, 38 Utah, 500, 113 Pac. 1032, or if he had done so under the circumstances that prevailed in *Oswald v. Light & Ry. Co.*, 39 Utah, 245, 117 Pac. 46, it might well be held, as it was held in those cases, that a nonsuit or a directed verdict would have been proper. We have, however, often

held that the same degree of care is not imposed upon a pedestrian attempting to cross an ordinary street car track that is imposed on him in attempting to cross a steam railroad track. The reason of the rule is so palpable that it requires no discussion. We have also often defined the reciprocal duties imposed upon both the street car company and the ordinary traveler so far as those duties can in terms be defined. In that regard we have held that, while the street car company possesses a preferential right of passage along and over its street car tracks to which right all others must yield, yet that the duty of exercising ordinary care by both the company and the traveler who may be using the street is reciprocal; that is, both the traveler and the street car operatives must exercise ordinary care as more particularly defined and stated in *Spiking v. Railway & P. Co.*, 33 Utah, 337, 93 Pac. 838, and in other cases decided since then. In view of those decisions, under the circumstances of this case, what was the duty that was imposed both the plaintiff and the operators of the street car in question? It is manifest, as already state, that by either stopping and listening, or by stopping and looking for the approaching car, the plaintiff could have discovered its approach, and could thus have avoided the collision.

A traveler, under the law, however, is not required either to stop and listen, nor yet to specially look for an approaching car. He is bound to exercise ordinary care for his own safety in passing over a street car track, and whether 4 he has complied with that duty under the peculiar circumstances as they are developed in each case is, ordinarily, a question of fact and not of law.

But let us assume that the plaintiff in this case did not exercise that degree of care that he should have exercised, yet the defendant had no right, for that reason, to run him down, if, by the exercise of ordinary care, it could have avoided doing so after discovering either his listlessness or his peril. The evidence is such that the jury could have found that the motorman conducting the car in question could have seen, and therefore they had a right to infer that he 5 did see, the plaintiff passing from the south side of the street towards the street car tracks. Moreover, the evi-

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dence shows that the motorman must have observed that the plaintiff, whether he were old or young, seemed mentally engrossed, and was thus not fully exercising all of his faculties. Notwithstanding that, as the evidence shows, the motorman continued to drive his car at more than double the rate of speed authorized by the ordinance, not only on the main portion of the street, but near the street crossing. Now, the very purpose of fixing a speed limit is to place the movement of cars under the full control of the motorman at all times. Under the evidence, the jury, in passing upon the effect of Mr. Jewett's testimony, who was an experienced railroad man, could well have found that if the motorman had obeyed the ordinance he could easily have stopped the car after he discovered that the plaintiff was not conscious of its approach, and thus could have avoided the collision. The jury thus would have been justified in finding that the motorman's negligence was the proximate cause of the collision and consequent injuries to the plaintiff.

It is elementary that the negligence of either party, in the eye of the law, is operative only when it constitutes the proximate cause of the injury or damage complained of. If it is merely the remote cause, the law regards it as inoperative and of no consequence. Suppose it be conceded, therefore, that the plaintiff was negligent in crossing the street in the manner he did, yet the jury would have been 6 authorized to find, under the evidence as it stood at the time the motion for nonsuit was made, that his negligence, under all the circumstances, was not the proximate cause of the injury. If it be once held that under such circumstances conduct like that of the plaintiff prevents a recovery as a matter of law, then the street car company may with impunity run down every pedestrian, be he young or old, physically sound or unsound, if he does not avoid a collision by stopping, looking, and listening for an approaching car. Had the operator run his car within the speed limit, and the plaintiff had stepped in front of the approaching car and so near to it that the operator could not have avoided striking him, the case would be entirely different. That is, in effect, the Pratt case. This case, however, for the reasons stated, is controlled by

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circumstances which are entirely different. Here the jury, under the facts and circumstances, could well have found, under plaintiff's evidence—and they must have so found under all the evidence—that the accident was entirely due to the defendant's negligence. Under such circumstances, courts may not dispose of a case as a matter of law.

For the reasons stated, therefore, the judgment ought to be, and it accordingly is, affirmed, with costs.

STRAUP, C. J., and McCARTY, J., concur.

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LITTLE v. STRINGFELLOW.

No. 2761. Decided August 4, 1915. (151 Pac. 347.)

1. **APPEAL AND ERROR—FINDINGS—SUPPORT IN EVIDENCE—REVIEW.** All parties are entitled to invoke the Supreme Court's judgment on the facts in equity cases, and where the findings of fact are clearly against the evidence, or the court is satisfied that the presumption of their correctness has been overcome by the record, it must make or direct findings according to the evidence and the law applicable thereto.<sup>1</sup> (Page 583.)
2. **LOST INSTRUMENTS—DEEDS—RESTORATION—SUFFICIENCY OF EVIDENCE.** Evidence in an action to restore a lost deed brought against the administrator of one of the alleged grantors, notwithstanding the trial court's findings that the deed was made, acknowledged, and destroyed, *held* to require a decree restoring the deed. (Page 584.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action in equity by Alice S. Little against Joseph W. Stringfellow, as administrator of Fannie Maria Little Stringfellow, deceased.

Judgment for defendant, dismissing complaint. Plaintiff appeals.

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<sup>1</sup>*Campbell v. Gowans*, 35 Utah 268; 100 Pac. 397; 23 L. R. A. (N. S.) 414; 19 Ann. Cas. 660; *Utah Commercial & Savings Bank v. Fox*, 44 Utah 323; 140 Pac. 660.

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REVERSED and remanded, with directions.

*Gustin, Gillette & Brayton and Weber & Olson*, for appellant.

*Young, Snow, Ashton & Young*, for respondent.

FRICK, J.

The plaintiff commenced this action in the District Court of Salt Lake County, in equity, against the defendant as administrator of the estate of one Fannie Maria Little Stringfellow. The purpose of the action was to restore a lost deed, which, it is alleged, the deceased, during her lifetime, had executed and delivered to the plaintiff and in which certain property which was specifically described was conveyed to her. The defendant, after admitting all the matters of inducement contained in the complaint, denied the execution and delivery of the deed referred to in the complaint.

The deceased was the wife of the defendant and the sister of the two other grantors in the deed in question. During her lifetime, she was the owner of a one-fifth interest in the property in question, and her two sisters and two younger brothers were the owners of the other four-fifths. She died at Salt Lake City, in January, 1913, and the defendant was appointed administrator of her estate. The plaintiff was the mother of the deceased, and lived on the premises in question, which, it appears, constituted the family home; that is, the home of the mother, the two sisters, and the two brothers. The deceased lived with her husband, the defendant, some little distance from the property in question.

At the trial the plaintiff in substance produced the following evidence:

A. J. Weber, a member of the Salt Lake bar, testified that on the 30th day of December, 1911, the deceased and her two sisters came to his office by appointment to sign and acknowledge the deed in question, and that he read the deed; that the property in question was therein described, and three-fifths thereof was thereby conveyed to the plaintiff by the three grantors, namely, the deceased, Romania, and Clara



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Little; that the grantors acknowledged the deed before him, and, after attaching his notarial seal thereto, he thinks the deceased took it, and the three sisters left his office which was in the Boston Building on Main street, in Salt Lake City.

Mr. Weber's stenographer, Miss Ethel Davis, testified that the three sisters came to Mr. Weber's office at the time stated by him, through an appointment she made for them.

Mr. Sallee, the principal of the high school of Filer, Idaho, and a friend of the Littles, testified that he knew the deceased in her lifetime, and he was acquainted with the other two sisters and their mother, the plaintiff; that he was in Salt Lake City, from September, 1912, to about June, 1913; that at a certain time during the fall of 1912, when he was at the home of the plaintiff, and the deceased was there also, she told the witness that they; that is, "we three girls, had given or deeded the property, this home," to the mother. This witness testified that the deceased made statements to that effect to him several times, and especially on Thanksgiving night, 1912, when he and she were again at plaintiff's home.

Mrs. May Dowse, who was an intimate friend of the deceased, and whose home it seems was close by where the deceased lived, testified that she very often visited the deceased; that she called on her on New Year's morning, 1912; that on that morning the deceased told the witness that she and her two sisters had made a deed to the home property and exhibited the deed to the witness; that the deceased said that she and her two sisters wanted to make a New Year's present of the home to their mother; that the witness examined the deed, and it was signed by the deceased and her two sisters Romania and Clara Little; that Mr. Weber's name was also signed to the deed and it had his notarial seal attached thereto; that the deceased said that her brother would call for the deed that morning; that the brother came while the witness was at the home of the deceased, and the deceased, in the presence of the witness, gave her brother the deed in question. Mrs. Dowse further testified that on the following day, the deceased told her that the "children" had given the deed to the mother on the preceding day and that she thereafter told the witness that she was glad that the mother had the prop-

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erty. The witness also referred to other instances when the deceased spoke about the matter; expressed herself as pleased that she and the girls had deeded the property to the mother, and that she wanted the two brothers to do the same when they arrived at the age of majority.

Mr. J. J. Meyers, hotel inspector for the State of Utah, testified that he was a friend of the Littles; that on New Year's day, 1912, he was at the Little home making a New Year's call between the hours of three and five o'clock in the afternoon; that he and Prof. Madden, a teacher, Romania and Clara Little, and the plaintiff were present, that a written instrument was handed him and he partially opened it; that, while he did not read the whole instrument, he saw that it was signed by the deceased, by Romania, and by Clara Little; that a few days later he was invited to a dinner at the deceased's home, and while there the question about the home was again brought up. He further testified:

"And I made the remark to Mrs. Stringfellow (the deceased) that I thought it was a nice thing of the children to give the mother the property, and she said, 'Yes, and I am glad she has got it.' "

Mrs. Mabel E. Rothwell, another witness for plaintiff, testified that she knew the deceased in her lifetime; that in October, 1912, the witness called at the home of plaintiff; that she met the deceased there, and, in a conversation about the expense of keeping up a home, the deceased said to her:

" 'Yes, you know we girls deed the home to mamma.' (Quoting from bill of exceptions.) And I said, 'No, I didn't know it,' and she said, 'We have,' and I said, 'That is very nice of you,' and she said, 'Yes, we always want mamma to have a home.' "

Romania Little, one of the grantors, testified very fully with regard to the execution and delivery of the deed. She, among other things, said: That the deceased, herself, and her Sister Clara, met at Mr. Weber's office on the evening of December 30, 1911, to sign and acknowledge the deed in question. That they had telephoned Mr. Weber, and the deceased had the unsigned deed with her. That the deceased said to Mr. Weber:

"Mr. Weber, we want you to read this over and see that everything is all right, see that Joe (the defendant) made it all right, and we want you to be the notary public."

That they all three signed the deed there, and Mr. Weber took their acknowledgement, and the deceased then took the deed. That the next time she saw it was on New Year's morning, January 1, 1912. That her brother went to the home of the deceased on New Year's morning and returned with the deed and a note or letter from the deceased and a bunch of violets. That the witness, Clara, and her two brothers then went upstairs to the mother's room, and the brother then read the note or letter to the mother, after which he gave the deed, the note, and the violets to her. The witness then testified where the deed was kept by the mother, that it was not recorded, and that it was missed some time early in January, 1913. Although the witness testified at great length, it is not deemed necessary to further set forth her testimony in detail.

The older brother also testified that on New Year's morning he went to the deceased's home by appointment, for the deed; that he then saw the deceased and Mrs. Dowse, the witness we have before referred to; that the deceased gave him the deed and the note or letter she had written to her mother and a bunch of violets; that he took them all home and delivered all of them to the mother in the presence of his two sisters, and his brother younger than he. This witness further said that the deceased had frequently spoken to him about the mother and had told him that she thought that when he became of age it was his duty to deed his interest in the property to the mother. The older brother was about seventeen years of age, and the younger one about fourteen at the time.

Clara Little's testimony was practically the same as Romania's in regard to the signing and delivery of the deed, and the younger brother also testified to the delivery the same as his brother and sisters.

Mrs. Jane Kimball, a lifelong friend of the deceased, testified that shortly after New Year's, 1912, in a conversation with the deceased, the latter told the witness that they, the three girls, had given a deed to the mother; that she said that

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she had delivered "the deed to her home, the girls had signed it, and the home is mamma's." The witness further testified that up to within a month of her death the deceased had often spoken about her mother, and that the deceased was glad that the home was deeded to the mother.

The plaintiff testified that she had received the deed and told where she had kept it; that it was not recorded, and that she missed it early in January, 1913; that she had made diligent search, but could not find it anywhere.

It was also shown that during the last sickness of the deceased the defendant sometimes slept in the room where the deed was kept. All the sisters and brothers further testified that the deed, after its delivery, in the presence of the plaintiff, was shown to the defendant, and that plaintiff asked the defendant why he did not sign it, and that he said he did not own the property and did not give it, and did not have to sign; that "I have done my part in having it made up."

The defendant testified in his own behalf. He said that the latter part of May, or fore part of June, 1912, he prepared a quitclaim deed, whereby the property in question was to be conveyed to the plaintiff; that he prepared it at the request of the deceased, and it was to be signed by her, Romania, and Clara Little; that the deed was in his own handwriting on a printed form; and that the same was on the following day signed and acknowledged by the three sisters before Mr. Weber. The witness testified that the deed was prepared for the reason that Romania was at that time being courted by a certain schoolteacher who was in some trouble, and for that reason the deceased wanted Romania's interest in the property protected. He also said that he frequently saw the deed thereafter at his home until some time in October. The witness also, so far as he knew the facts, denied various statements testified to by the plaintiff's witnesses as well as the statements attributed to him.

Miss Grace Stringfellow, a sister of the defendant, also testified in his behalf. The substance of her testimony is to the effect that in the fall of 1912 the defendant was away from home much of the time; that during his absence the deceased "stayed at her mother's home part of the time, at

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our home part of the time, and her sister stayed at her own home with her part of the time, and I stayed with her part of the time"; that during the time the witness stayed with the deceased they did some sewing on the deceased's sewing machine; that the witness, in looking for a pair of scissors, discovered the "deed" in the upper machine drawer; that she did not read the deed, nor did she critically examine it, but she saw the names of the deceased, of Romania, and of Clara Little on what she called the top of the deed; that it was written on a blank form, and the blanks were filled in in the handwriting of the defendant; that she did not see any signatures to the deed and did not know whether it was signed, nor did she notice any notarial seal attached thereto. In answer to the question, "Did you observe whether it purported to be a deed from the girls to Mrs. Little?" she answered, "Yes, it was a deed from the girls to Mrs. Little for the home." She also says that she then called the deceased's attention to the deed, and that (referring to the deceased) "she took it this way and just ripped it up, and said: 'This is no good; we are going to buy mamma another little home.' " The witness further said that after the deceased had torn up the deed the witness gathered up the pieces and took them "downstairs and put them with my own hand in the stove."

E. W. Stringfellow, a brother of the defendant, also testified that "along about August, 1912, he saw a deed at the home of the defendant in the dining room." He, however, did not examine it, nor did he know what became of it, nor did he in fact know that it was an executed deed.

Ada Stringfellow, a sister-in-law of the defendant, testified that, as well as she could remember the time, "it was in the spring or early summer," perhaps June, 1912, when she met the deceased, Romania, and Clara Little in front of the Boston Building in Salt Lake City; that they spoke to her and said that they had been up (in the building) to see about having a deed signed for their mamma; that she observed that the deceased held a paper in her hand "indicating" a deed, and she said, "We have been up having a deed signed for mamma."

Mr. Weber was also called as a witness by the defendant

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who testified that he well recollected the incident of acknowledging the deed in question; that he acknowledged only one deed for the three sisters for their interest in the home, which was the deed he had previously testified about.

The District Court made the following findings of fact:

“That the said Fannie M. Little Stringfellow did not, on December 31, 1911, or at any other time, convey a transfer by any good or sufficient deed her interest in or to the property hereinbefore described, and that the said Fannie M. Little Stringfellow did not convey to the plaintiff herein her interest in or to said property or any part thereof; that the said Fannie M. Little Stringfellow did not on or about the first day of January, 1912, or at any other time, deliver to the plaintiff any deed to the said described lands; that the plaintiff herein did not at any time lose any deed to the said described premises which has been executed by the said Fannie M. Little Stringfellow.”

The court then proceeds to find that the deed was made, acknowledged, and destroyed as claimed by the defendant and his sister. Upon such findings, the court made conclusions of law and entered judgment dismissing plaintiff's complaint. The plaintiff appeals. Her counsel, in their brief, state the matter presented for review thus:

“This appeal being taken wholly on questions of fact and sufficiency of the evidence to warrant the findings of the court, it is not necessary,” etc.

We have carefully read all the evidence which is preserved in the bill of exceptions, and we have attempted to reflect the controlling portions thereof as fully as it is possible to do that within the limits of an ordinary opinion. Counsel for the appellant insist that, in view that this is an equity case, she is entitled to our judgment upon the facts, and that 1 it is our duty to determine whether the findings are supported by the evidence or whether they are clearly against the weight thereof. It is well settled in this jurisdiction that all parties are entitled to invoke our judgment upon the facts in equity cases within the limits stated in *Campbell v. Gowans*, 35 Utah, 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 660, and *Utah Commercial & Savings Bank v. Fox*, 44

Utah, 323, 140 Pac. 660. We need not again state the rule laid down in those cases. It is sufficient to say that a mere cursory analysis of the evidence in this case shows that it comes squarely within the rule laid down in those and other cases there referred to.

In our judgment, the findings of the district court are not only against the great weight of the evidence, but they are against the inherent probabilities which naturally arise therefrom. Mr. Weber, Miss Davis, his stenographer, 2 Mrs. Dowse, Mr. Meyers, Miss Romania, and Miss Clara Little, the two brothers, and the plaintiff, must all be branded as willful and corrupt perjurers if the findings as made are true. Each one of those witnesses gave some good reason why they knew the deed in question was executed and delivered at the time stated by them. True, they did not all testify to the delivery; but they all testified to its execution, and five of them testified directly to its delivery, and the statements of the other witnesses, if true, show that the deed must have been delivered, as claimed by the five witnesses just referred to. The statements of the other witnesses to which reference is made are those concerning the declarations of the deceased that the property in question had been deeded to the plaintiff. In this connection it must be remembered that the deceased did not make but one declaration, at but one time, to only one person; but that the declarations testified to were repeatedly made at different times and to different persons under different circumstances, and were of such a character that the witnesses hearing them could not well have mistaken their tenor or effect. The declarations of the deceased therefore were entitled to much more weight than is the case where a mere casual declaration is testified to by one or even several witnesses which was heard only once.

It is contended that the children of plaintiff were biased in their mother's favor, as a matter of course, and that the other witnesses were her friends, and thus were influenced by their friendship. It is no doubt true that friendship in many instances may and does tend to influence a witness so that he may color his statements most favorable to his friend. Mere friendship will, however, not invent facts and commit willful

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perjury to sustain a cause. Why should Mr. Weber, Mrs. Dowse, Mr. Meyers, and Mrs. Kimball commit perjury? So far as the record shows, they could gain absolutely nothing by pursuing such a course. If therefore it were assumed that the two sisters, the two brothers, and the plaintiff, because of their interest, were tempted to falsify, yet their statements were directly corroborated by Mr. Weber, Miss Davis, Mrs. Dowse, and Mr. Meyers, and indirectly by the statements of Mrs. Rothwell, Mrs. Kimball, and Mr. Sallee. This is so far the reason that, if the deed had not been executed and delivered as stated by the two sisters, the two brothers, and their mother, the declarations attributed to the deceased by Mrs. Rothwell, Mrs. Kimball, and Mr. Sallee could not have been made by her, and hence could not be true. It should be remembered, in this connection, that Mrs. Kimball, a lifelong friend of the deceased, testified that within a month of her death the deceased expressed herself as being pleased that the property had been deeded to the mother. If the deed had been destroyed in October, 1912, as contended for by the defendant, the deceased could not have made the statements to the contrary after that date as testified to by Mrs. Kimball.

It is suggested, however, that, if the deed in question was executed and delivered as testified to by plaintiff's witnesses, then the defendant and his witnesses must have committed perjury. This conclusion does not necessarily follow. So far as Miss Grace Stringfellow's statements are concerned, all that she said may in substance be true, yet it in no way affects the truthfulness of plaintiff's witnesses. Miss Stringfellow may have seen a paper destroyed which she concluded or assumed was a deed. It is significant that she saw no signatures to the instrument that she said was destroyed and noticed no notarial seal attached thereto. What Miss Stringfellow described, therefore, was not an executed deed, but she merely concluded or assumed that the paper she saw was a deed. Then, again, it was an easy matter for her to have been mistaken regarding the import of the deceased's declaration made at the time. That she was mistaken in that regard is made clear from the fact that the deceased repeated her former declarations to Mrs. Kimball that the property had been deeded



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to the plaintiff, which declarations were made after the event testified to by Miss Stringfellow occurred, all of which could not have been made if the paper testified to by her was the deed in question. This disposes of Miss Stringfellow's testimony. Now as to the defendant's statements: The defendant at the time was a practicing attorney. It was therefore not only possible, but was quite within the range of probabilities, that he may have been mistaken with respect to the time he prepared the deed he referred to. He may also have been mistaken with regard to the fact that he prepared but one instrument. It requires neither argument nor illustrations to convince any experienced lawyer how easily mistakes occur with regard to the time a particular thing was done, or with regard to whether but one or more instruments of the same nature were prepared at one or at different times. So far as the defendant's side of the case is concerned, therefore, there is no direct evidence whatever that any executed deed was ever destroyed. All there is in that regard is that the defendant testified that in May or June, 1912, he prepared a deed which he thinks was signed by the three sisters and acknowledged before Mr. Weber on the day after it was prepared by him. Its execution and acknowledgment was, however, assumed by the defendant, since he was not present. When asked whether or not he, as the husband of the deceased, had signed the deed he had prepared, he was unable to say whether he had or had not done so. If his memory failed him in a matter as important as the signing of the instrument, how can it be said that he could not have been mistaken with respect to time or dates, a matter with respect to which most witnesses do fail, and with respect to which all at times may fail? The testimony of Ada Stringfellow, a sister-in-law of the defendant, is even weaker than that of the defendant and his sister. That of the defendant's brother is of no consequence whatever. While it may be said therefore that from the testimony of defendant and his witnesses, when considered alone, an inference could be deduced that a deed was signed and executed but not delivered and thereafter destroyed, yet, when that testimony is considered, as it must be, in the light of the direct and positive statements of plaintiff's witnesses, the in-

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ference entirely fades away. Then, again, the mere fact that the deceased destroyed the deed in the manner stated by Miss Stringfellow lends at least some color to the claim that it was not an executed deed. It is not at all likely, and it certainly is not usual, that one joint grantor will, without consulting the wishes of his co-grantors, destroy an executed deed. This is just what the deceased must have done if Miss Stringfellow's statements are correct. While that might be possible, yet where, as here, there is so much evidence, both direct and indirect, against such an assumption, we are forced to the opposite conclusion, namely, that the paper that Miss Stringfellow testified was destroyed in the nature of things was not, and, in view of all the evidence, could not have been, the deed in question.

In conclusion, we desire to add that while due consideration should always be given to the fact that the trial courts have an opportunity to see and hear the witnesses, and therefore are in a better position to determine the weight or effect that should be given to their statements, or to the statements of any one of the witnesses, yet that fact standing alone cannot always control. This case affords an apt illustration of what has just been stated. In the case at bar, plaintiff's witnesses stand unimpeached either directly or indirectly. Nor is there anything in their statements from which one might say that they were mistaken, much less that they testified falsely. Where there is such an array of credible witnesses, whose reputations stand unassailed, and when there is nothing made to appear why their statements should not be believed, and where at least many circumstances are made apparent why the statements should be believed, this court cannot escape the responsibility of determining what the findings and judgment should be, regardless of what the trial court may have found. Under such circumstances, we must follow our own convictions which naturally spring from a consideration of all the evidence, and enter judgment accordingly.

The judgment therefore is reversed, and the case is remanded to the district court of Salt Lake county, with directions to set aside the findings of fact and conclusions of law and to enter findings of fact and conclusions of law in accord-

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ance with the views herein expressed, and to enter a decree restoring the deed in question, as prayed for in plaintiff's complaint. Appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

WRIGHT v. HOWE, et al.

No. 2695. Decided June 26, 1915. Application for Rehearing, Aug. 5, 1915 (150 Pac. 956).

1. **DISMISSAL AND NONSUIT—FAILURE TO PROSECUTE.** Defendants who had the same right as the plaintiff to press the action to trial, but who permitted it to remain pending for about three years, in the absence of any showing of prejudice, could not complain of the overruling of their motion to dismiss the action for failure to prosecute. (Page 589.)
2. **APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION ON WRONG THEORY.** In an action to recover damages for the death of four horses and for injury to a fifth alleged to have resulted from defendants' sale of boiled linseed oil, instead of the raw linseed oil, called for for veterinary uses, error, if any, in an instruction given on effect of warranty on which theory the case was improperly tried was not prejudicial to defendants. (Page 591.)
3. **NEGLIGENCE—LIABILITY OF SELLER OF GOODS.** Defendants, dealers in linseed oil and other merchandise, who, on plaintiff's request for raw linseed oil to be fed to horses, and which was a wholesome medicine, delivered boiled linseed oil, which was poisonous and deleterious to them, so that they became sick and died, and one was injured so as to be worthless, were liable in damages for the tort or wrong, rather than for breach of either an express or implied warranty of quality. (Page 592.)
4. **NEGLIGENCE—LIABILITY OF SELLER OF GOODS—CONTRIBUTORY NEGLIGENCE.** In such case the plaintiff was not bound to inspect the oil, and was not negligent in failing to inspect it before administering it to his horses, as he had a right to rely and act upon the belief that the defendants had delivered raw linseed oil, as requested, unless it was clearly apparent from a mere ordinary or casual observation that such had not been done. (Page 594.)

Appeal from District Court, Third District; Hon. F. C. Loofbourou, Judge.

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Action by S. B. Wright against Richard Howe and Frank Howe, partners under the firm and style name of Murray Coal & Lumber Company.

Judgment for plaintiff. Defendants appeal.

AFFIRMED.

*David W. Moffat*, for appellants.

*King & Nibley* and *Samuel Russell* for respondent.

FRICK, J.

The plaintiff sued the defendants to recover the value of four horses and damages for an injury to a fifth horse. It is, in substance, alleged in the complaint that the death of the four horses and the injury to the fifth were caused through the wrongful acts of the defendants, as will hereinafter appear. Defendants' answer was, in effect, a general denial.

There is a preliminary question arising upon a motion of the defendants to be disposed of first. After the case had been pending for about three years the defendants moved to dismiss the action, "for the reason that the plaintiff herein has failed and neglected to prosecute said action with reasonable diligence." While the record is not clear what ruling the court made on the motion, yet, in view that 1 it proceeded to trial, we shall assume the court overruled the motion, and defendants have assigned the ruling as erroneous, and now urge that the court erred in not dismissing the action. There is nothing in that contention. The defendants had the same right to press the action to trial that the plaintiff had, and if they were willing to permit it to remain untried, and especially in the absence of any showing of prejudice, they cannot complain.

Proceeding now to the merits: At the trial the plaintiff, in substance, proved that in March, 1910, he was engaged in the livery business at Murray City, Utah, and at that time was the owner of four horses, which were particularly described and their value testified to; that at said time there

were also other horses kept in his livery business, one of which was owned by one Dalton, who was employed by the plaintiff in said livery business; that said horses at the time were ailing somewhat, and one Dr. Locke, a veterinary, who was consulted by the plaintiff, advised him to give the horses some raw linseed oil as a physic; that the plaintiff directed his employee, Mr. Dalton, to go to the place of business of the defendants, who were dealing in linseed oil and other merchandise, and get a gallon of raw linseed oil. Mr. Dalton went to get the oil, and, regarding that matter, he, in substance, testified:

"I took a can and went over to Mr. Howe and asked him for a gallon of raw linseed oil. \* \* \* He went and took the can and went back to the barrel and drew a gallon from it. Q. And you asked him for raw linseed oil? A. Yes, sir. \* \* \* Q. And did he deliver to you the oil? A. Yes, sir. \* \* \* Q. Did he know what you wanted when you first appeared there? A. I told him I wanted it to feed to my horses. Q. Did you say anything to Mr. Howe about Mr. Wright [the plaintiff] having sent you for the oil? A. No, sir."

The witness then took the oil he obtained from Mr. Howe, one of the defendants, to the livery barn, and he and Mr. Wright, the plaintiff, administered the same to four of the horses. Mr. Wright then took the can in which the oil was brought by the witness Dalton to defendants' place of business and got another gallon of oil. The witness and Mr. Wright then gave a quart of the oil to the fifth horse. Mr. Dalton further testified:

"Then I started to take him [the fifth horse] back, and got to the door, when I seen all the rest of them foaming at the mouth; and I called Mr. Wright and told him they were sick, and he came to see them. And he ran right for the veterinary then."

The witness also said that the horse that was given some of the oil brought by Mr. Wright also got sick. He further said:

"The bay mare died that night, and the others lingered a day or two, and then four in all died."

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The four horses that died, the witness said, belonged to Mr. Wright, and the one that did not die belonged to him; that it practically became worthless, and he had assigned his claim to Mr. Wright. It was then shown that, while raw linseed oil is a wholesome medicine for horses, boiled linseed oil is poisonous and deleterious to horses and cattle. The veterinary testified that he was called to see the horses that were sick on the night in question, and that the horses were poisoned. The doctor further said that he saw boiled linseed oil in a can; that the horses were sick from having been given boiled linseed oil. The witness Dalton was recalled, and said that some of the oil that was bought from defendants was left in the can; that the veterinary saw the oil that was left in the can aforesaid, some of which had been given to the horses that became sick. After showing the value of the horses and the depreciation in the value of the horse that had not died, the plaintiff rested.

It is not necessary to set forth defendants' evidence, since we rest the decision entirely upon plaintiff's evidence.

The case was tried to a jury, who returned a verdict for the plaintiff, and the defendants appeal.

The court charged the jury as follows:

"The court instructs you that any affirmation of fact respecting the quality of goods sold, made by the seller during the negotiations for the sale, if received and relied upon by the buyer, is an express warranty by the seller as to such quality of said goods."

Exception was taken to this instruction, and the giving of it is assigned as error. We remark that the charge is not a model one in a case like the one at bar. For reasons hereinafter appearing, we do not think that the defendants were prejudiced by the charge, and hence the judgment should not be reversed upon that ground. We are clearly of the opinion that both parties, as well as the court, tried the case upon a wrong theory. All through the trial of the case in the district court, and in the respective briefs of counsel in this court, the case was tried and is presented upon the theory of either an express or implied warranty of quality. While, as pointed out by some of the courts, a case like the one at

bar may partake more or less of what are called warranties, yet the action is not one of breach of warranty. The action is in tort for a wrong committed by the seller, rather than one for a breach of contract of warranty.

Let us examine now, the real facts for a moment. The witness Dalton went to the defendants' place of business to purchase raw linseed oil to be used for a particular purpose, which he then disclosed to one of the defendants. If the defendant had sold or delivered to Mr. Dalton raw linseed oil of an inferior grade or quality, the question of 3 either an express or implied warranty might prevail. The defendant, however, did not sell or deliver raw linseed oil, but he sold and delivered something entirely different, namely, boiled linseed oil, which possessed some properties which were entirely different from the properties of raw linseed oil. The plaintiff thus requested, and supposed he was buying, one article possessing no harmful properties to animals, while the defendants sold him, not an inferior grade or quality of the article called for, but a different article possessing properties deleterious to animal life. This case falls squarely within the principle which controlled the case of *Jones v. George*, 61 Tex. 345, on page 349, 48 Am. Rep. 280. That was an action for a so-called breach of warranty. Mr. Justice Stayton, speaking for the Supreme Court of Texas, states the law governing such actions in the following words:

"It is not pretended that the seller warranted the article sold to be such a substance as would accomplish the purpose desired by the buyer; but it is certainly true that he sold and delivered it as and for 'paris green,' that it was for this the parties mutually contracted, and that the delivery of something else was not a compliance with the contract, it not being shown that the purchaser bought the substance delivered, taking upon himself not only the risk of quality, which is the matter to which warranty applies, but also of kind. It is evident that the buyer relied on and trusted the representation of the seller. If the article delivered had been 'paris green,' but of an inferior quality, then the question would arise, the seller knowing for what purpose it was bought, whether there was an implied warranty in the sale of such an article, for such a known purpose, that the article delivered should be of a quality necessary to accomplish the purpose which a good quality of 'paris green' would accomplish in the matter in which the buyer intended to use it. That, however, is not this case. The appellant contracted to buy, and the appellee contracted

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to sell and deliver, 'paris green,' and not some other substance; but 'chrome green,' a substance not having the properties of 'paris green,' though resembling it in appearance, was delivered. In such cases, technically, no warranty arises, but there is an implied contract that the thing sold and delivered is of the kind which the parties contracted with reference to."

The authorities cited in support of the Texas case are the following: Benjamin on Sales, section 600; Pollock's Principles of Contracts, 465; Story on Contracts, 1079. See Benjamin on Sales (7th Ed.), p. 679, where the cases are collated. See, also 2 Mechem on Sales, section 1209, where the nature of such sales is discussed. As pointed out in the Texas case, if an article is requested by the purchaser which is to be used for a particular purpose which is made known to the seller, and the latter sells and delivers an entirely different article, and the purchaser is ignorant of the nature of the article, and accepts and uses it, and thus cannot return it when he discovers that he has received an article different in character from the one ordered, and is injured and damaged by its use, he may recover all damages that are directly caused by the use of the article delivered to him. The doctrine is illustrated in the Texas case where the purchaser called for "paris green" to be used as a poison to kill certain worms which were destroying the purchaser's growing cotton crop. The seller, however, sold and delivered "chrome green," which did not possess the properties of "paris green," and hence did not kill the cotton worms, which succeeded in destroying the purchaser's cotton crop. The court accordingly held that the purchaser could recover "the value of the crop as it stood just before it was destroyed by the worms, what the cost of the compound was, and the further cost of its preparation and application to the cotton, with interest on the money thus expended." See, also, Mechem on Sales, section 1824; Benjamin on Sales (7th Ed.) 963.

But it is contended that it was plaintiff's duty to inspect, and that he was negligent in not inspecting the oil before administering the same to the horses. There is nothing in the evidence from which any negligence could be deduced. More-



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over, the plaintiff, as well as Mr. Dalton, had a right to rely and act upon the belief that the defendants had 4 delivered raw linseed oil, unless it was clearly apparent from a mere ordinary or casual observation that such had not been done. As is well said by Mr. Justice Cooley in the case of *Eaton v. Winnie*, 20 Mich. 166, 4 Am. Rep. 377:

"If a party's own wrongful act has brought another into peril, he is not at liberty to impute the consequences of his acts to a want of vigilance in the injured party, when his own conduct and untruthful assertions have deprived the other of that quality and produced a false sense of security."

In the case of *French v. Vining*, 102 Mass. 136, 3 Am. Rep. 440, Mr. Justice Ames, speaking for the court, in referring to circumstances somewhat like those in the case at bar, says:

"The buyer has a right to suppose that the thing which he buys, under such circumstances, is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill or actual knowledge of the vendor."

In that case the purchaser bought hay to feed a cow, upon which hay some dry poison had fallen, and which the seller thought he had removed from the hay, and sold it to the purchaser, who was ignorant of the fact, and who fed the hay to the cow, which died. The action was to recover the value of the cow, and in the course of the opinion the court made the foregoing observation. The purchaser recovered judgment in the court below for the value of the cow, and the judgment was affirmed on appeal. To the same effect are the cases of *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336, and *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389.

The plaintiff in this case alleged and proved all the elements which, under the law, entitled him to recover, and hence there is nothing in the contention that the verdict of the jury and judgment are contrary to law and facts, nor is it of any importance, under the circumstances, that both parties assumed that the right of recovery depended on a warranty. Nor is there any merit in the contention that the court erred in charging the jury with regard to the measure of damages. The charge in that regard was in compliance with the law as indicated above. Nor did the court commit reversible error in refusing defendants' requests to charge. While it is true,

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as we have already pointed out, the court's charge could have been improved on, yet the requests were based upon the same theory that the court's charge was based on, and thus would not have enlightened the jury nor aided them in arriving at a verdict. But the jury, under the evidence and law applicable thereto, arrived at a proper verdict. We have not discovered anything in the record from which we can say the defendants suffered prejudice. It is true that their counsel assigned many errors occurring in the admission of evidence which he contends were prejudicial. While the court admitted a few answers which verged on the border line of being hearsay and conclusions, yet all of these were harmless. If they all had been excluded from the record, the evidence would, to all intents and purposes, still have been the same. Nor was there anything in the answers objected to which could have misled or influenced the jury to defendants' prejudice. Considering the record as a whole, we are clearly of the opinion that, under all the circumstances of this case, no prejudicial error was committed by the court.

The judgment therefore should be, and it accordingly is, affirmed, with costs.

STRAUP, C. J., and McCARTY, J., concur.

### ON APPLICATION FOR REHEARING.

FRICK, J.

A petition for a rehearing has been filed in which it is strenuously insisted that the decision is erroneous in the following particulars:

(1) It is contended that we erred in not reversing the judgment, for the reason that the trial court erred in not sustaining appellants' motion to dismiss the complaint for failure to prosecute the action, and that we failed to pass or at least failed to sufficiently state our reasons in passing, upon that assignment in the original opinion. There is not the slightest merit to the contention. The case had been at issue about three years. In this state, if an action be determined

otherwise than upon the merits, the plaintiff may, within one year thereafter, bring another on the same cause of action regardless of the statute of limitations, provided only that the original action was timely begun. A defendant moving to dismiss, although his motion be sustained, can gain no permanent advantage, since the plaintiff has the right at any time within a year to bring another action. In view of that fact, the whole matter of whether a motion to dismiss for want of prosecution should be sustained or not should be permitted to rest within the sound discretion of the trial courts. If those courts, therefore, refuse to dismiss the action on that ground, we should not interfere unless and until it is clearly made to appear that the defendant in the action has been prejudiced in some substantial right. Merely failing to promptly prosecute an action is not sufficient to show prejudice. This is especially true where the defendant may himself press the action to trial. Appellant could have done that at any time within the three years the action was pending. This court, in a number of decisions, has clearly indicated that it is the policy of the law to have cases tried and determined upon the merits whenever such a course is possible, and where it does not clearly invade the rights of one of the parties. The motion in question was, however, not made a part of the bill of exceptions, and it is very doubtful, to say the least, whether or not it is a part of the judgment roll. We think it is not. We gave the appellant the benefit of the doubt, however, and passed on the motion. The trial court in no possible view, therefore, committed error in denying the motion to dismiss.

(2) It is next insisted that we erred in failing to hold that the trial court had erred in not sustaining appellants' motion to strike certain allegations from the complaint. Counsel, in his original brief, remained absolutely silent upon that subject, and therefore, under the well-settled practice of this court, he had waived that assignment. That also must have been the view respondent's counsel took of the matter, since he likewise said nothing in respect thereto in his brief. But, above and beyond all, the motion was entirely too sweeping, and it would have been error had the court sustained it.

(3) It is further contended that we erred in not holding

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that the trial court should have sustained appellants' motion for a nonsuit. This contention is, if possible, more devoid of merit than are the other two we have just discussed. The motion is not even referred to in the abstract, and upon an examination of the original bill of exceptions all that is made to appear respecting the same is as follows:

"Mr. Moffat: Now, if the court please, I desire to interpose a motion for a non-suit. (Motion for non-suit argued and submitted.)

"The Court: The motion may be denied."

In the face of this record no comment seems necessary.

(4) Finally, it is insisted that there was not sufficient evidence to sustain the verdict upon the second cause of action. Here again counsel has failed to comply with the rule of this court in failing to specify in what particulars the evidence is insufficient. We cannot supply matters of that character. In considering the assignments in the original opinion we passed upon every one which, in our judgment, was properly before us, or which possessed any merit whatever, and in case of doubt, in every instance, gave the benefit of such doubt to the appellant. Now counsel files a petition for rehearing in which he complains that this court has not done what under the settled practice we were powerless to do.

The petition is denied.

STRAUP, C. J., and McCARTY, J., concur.

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## MAYER v. FLYNN.

No. 2758. Decided June 25, 1915. Rehearing denied August 5, 1915  
(150 Pac. 962.)

1. **APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—FINDING.** In equity cases the findings of the trial court prevail, unless it clearly appears from the record that they are against the weight of the evidence. (Page 602.)
2. **APPEAL AND ERROR—FINDINGS OF FACT—REVIEW.** Under the Constitution, the parties to every appeal in equity cases have the right to invoke the judgment of the Supreme Court upon the facts as well as upon the law, so that, where the findings on the evidence as to boundaries were not clearly against either the volume or the weight of the evidence, and are such that the Supreme Court had practically the same opportunity to determine its weight as the trial court had, the Supreme Court must pass upon the evidence, determine the ultimate facts, and adjudicate the rights of the parties.<sup>1</sup> (Page 602.)
3. **BOUNDARIES—OCCUPANCY—FENCES AND PROJECTION OF ROOF.** In an action in equity to compel defendant to remove a part of his dwelling house from the plaintiff's premises, wherein the defendant claimed that plaintiff's house encroached upon his premises, and it appeared that plaintiff and his predecessors had been in the actual possession and use of his premises so far as they were bounded in part by a fence and by the projection of the roof of his cottage, and had paid taxes upon that much of the premises at least, defendant was bound to respect plaintiff's right to that extent, and, in view of the disputed boundary and the uncertainty of its location, each was bound to respect the rights of the other to the extent that each had taken actual possession of ground, whether within or without the line described in their respective deeds. (Page 606.)
4. **ADJOINING LANDOWNERS—ENCROACHMENTS—SUIT IN EQUITY—RELIEF.** In such suit, where the claimed boundary lines of the parties overlapped, and there was an uncertainty respecting the actual location thereof, neither law nor equity required that either of the lines described in the deeds of the parties should be followed, but where no injury would result to the complaining party by granting him what he was entitled to according to

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<sup>1</sup>*Savings Bank v. Fox*, 44 Utah 331; 140 Pac. 660; *Campbell v. Gowans*, 35 Utah 268; 100 Pac. 397; 23 L. R. A. (N. S.) 414; 19 Ann. Cas. 660.

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his possessory rights, and injustice would result if more were given, the doubt would be resolved in favor of the party on whom unnecessary injury would be inflicted by compelling the other to undo what he had done, though in good faith and under a claim of right, so that equity would limit each party to his possessory rights, and require the removal of so much of the roof of defendant's house as cast water perpendicularly upon the lower roof of plaintiff's cottage, regardless of the boundaries described in their deeds or surveys. (Page 607.)

Appeal from District Court, Third District; Hon. *T. D. Lewis*, Judge.

Action by Andrew J. Mayer against J. F. Flynn.

Decree for plaintiff. Defendant appeals.

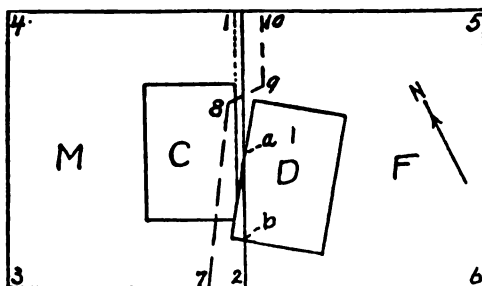
REVERSED and REMANDED, with directions.

*W. R. Hutchinson* and *D. W. George*, for appellant.

*King & Nibley* and *P. T. Farnsworth, Jr.*, for respondent.

FRICK, J.

The plaintiff, Mayer, commenced this action in equity to compel the defendant, Flynn, to remove a certain portion of the latter's dwelling house from the premises alleged to belong to the plaintiff. The following plat, with a little explanation, will make clear the real situation of the respective claims of the parties:



The plaintiff alleged that he was the owner and in possession of the parcel of ground marked M on the plat, bounded by the figures 1, 2, 3, and 4, on which he had erected a one-story cottage marked C. He further alleged that the defendant had erected a portion of his two-story dwelling house, which is marked D on the plat, on plaintiff's premises, and prayed for a mandatory injunction requiring the defendant "to remove said foundation and wall from plaintiff's premises and to remove the said eaves and roof from said plaintiff's premises," etc., and for general relief. The defendant answered plaintiff's complaint, denying that his house or wall was on plaintiff's premises or any part thereof. As an affirmative defense the defendant averred that he was the owner of the parcel of ground marked F on the plat and bounded by the figures, 5, 6, 7, 8, 9, and 10. A trial to the court resulted in findings of fact, conclusions of law, and a decree in favor of the plaintiff requiring the defendant to remove that portion of his dwelling which encroached on plaintiff's premises as found by the court, and awarded plaintiff one dollar damages. The defendant appeals.

The court, in substance, found that the plaintiff was the owner and in possession of the parcel of ground bounded by the figures 1, 2, 3, and 4 as shown on the plat; that the defendant had willfully and wrongfully trespassed on the premises of the plaintiff by erecting a portion of the foundation of the two-story dwelling house aforesaid thereon, and by projecting a portion of the roof or eaves thereof over the roof of the plaintiff's cottage. In other words, the court, in effect, found that the defendant had encroached on plaintiff's premises by building a portion of the foundation of his house, together with the superstructure thereon as shown on the plat. The court made no findings respecting the defendant's allegations of ownership of the ground on which his dwelling stands. The defendant contends that the findings of fact are not supported by the evidence, and that they are contrary thereto, in that the evidence does not support the finding that the plaintiff owned or was in possession of the parcel of ground as found by the court and as outlined on the plat, but insists that the evidence shows that the defendant owns the ground

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claimed by him, and that therefore he had not encroached on plaintiff's premises, but, on the contrary, claims that a part of plaintiff's house stands on defendant's premises. By referring to the plat defendant's contentions, as just stated, are made clear. He claims his ground extends on the south from figure 6 to figure 7, and thence runs north along the broken line to figure 8, and thence east to the figure 9, and thence north to figure 10. By referring to the plat it will also appear that, if the court's findings and judgment shall prevail, then the defendant, to some extent at least, encroaches on the plaintiff's premises from about the point marked "a" on the north to the point marked "b" on the south. If, however, it should be determined that the defendant's claim respecting his ownership shall prevail, then a portion of plaintiff's house marked C on the plat stands on defendant's premises. The property in question is located in a mining town known as Bingham Canyon, in Salt Lake County. The evidence is without dispute that the boundary lines generally in said town, including government lines, are more or less unsettled, and their exact location on the ground is frequently in dispute, and always has been; that a deep canyon passes through the town about the center thereof, and that the houses are built along both sides thereof, extending, in many instances, far up the sides of the mountains, which in many places are more or less precipitous, and thus the boundary lines between lots and houses are not, and in the nature of things cannot be, fixed with that degree of certainty that can be done on level ground. Then, again, it appears that fixed and known monuments are few, and, where they have been set, they in some instances have been obliterated. Plaintiff's house, it seems, was erected some 16 or 18 years before the trial, and he, with his family, had lived in it for about 8 years. There is a fence extending back from the north end of plaintiff's property for about  $19\frac{1}{2}$  feet. The fence is indicated by the dotted line on the plat. Plaintiff's claim respecting the location of his boundary lines is based upon a survey made by a Mr. Hansen, a surveyor, who took plaintiff's deed, and from the calls therein ran the boundary lines shown by the figures 1, 2, 3, and 4, commencing at figure 1 marked on the plat. The defendant also produced



a surveyor who testified that he had located defendant's boundary lines according to defendant's deed, which, he claims, are as indicated by the figures 5, 6, 7, 8, 9, and 10 on the plat. The court, however, adopted the survey of the plaintiff's surveyor, and hence adjudged that the plaintiff was the owner of the ground bounded by the figures 1, 2, 3, and 4 aforesaid, and hence found that defendant's dwelling encroached on plaintiff's premises from about the point "a" to the point "b," and practically to the extent shown on the plat.

It has become the established rule of this court that in equity cases the findings of the trial courts prevail unless it is clearly made to appear from the record that the findings are against the weight of the evidence. While it is true that in this case the evidence is sufficient to support the findings, yet it is equally sufficient to support findings in 1 favor of the defendant's contentions. From that statement it would seem that the evidence is in conflict, and where that is the case the findings of the trial courts should prevail, because of their opportunity to hear and see the witnesses while testifying, and they thus enjoy a great advantage over us in determining the weight to be given to the testimony or to any particular part thereof. It is largely, if not entirely, for the latter reason that the rule has been established as we have stated it.

But it is also true that, under the provisions of our Constitution, the parties to every appeal in equity cases have the right to invoke our judgment upon the facts, as well as upon the law, and thus, within the rule stated, we 2 must pass upon the evidence and determine the ultimate facts. The rule is stated in *Savings Bank v. Fox*, 44 Utah, 331, 140 Pac. 660, and in *Campbell v. Gowans*, 35 Utah, 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 660. As already pointed out, the evidence relating to the boundary lines in question in this case would support a finding either in favor of those claimed by the plaintiff, and also in favor of those claimed by the defendant. Ordinarily, therefore, the findings of the court would prevail unless clearly against the weight of the evidence as before stated. The findings are, however, not clearly against either what may be termed the

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volume or the weight of the evidence. The evidence relating to the boundary lines is, however, of such a character that we possess practically the same opportunity to determine its weight as had the trial court. The evidence upon that phase of the case is practically without dispute, and comes from the surveyors who went upon the ground to trace the boundary lines from the respective deeds of the parties. The question is, therefore, one of law, rather than one of fact, in that we must determine what the respective rights of the parties are in law from what may be said to be the undisputed facts. In making either one of the surveys much had to be assumed or taken for granted. Plaintiff's surveyor, with commendable frankness, conceded at the trial that the point marked by the figure 1 on the plat, the starting point of his survey, was perhaps no more certain as a starting point or monument than is the point indicated by the figure 5 on the plat, which was the starting point of the defendant's survey. These points constituted the initial calls of the deeds of the respective parties, and were therefore taken as starting points to trace the boundary lines. While it is true that both surveyors referred to other monuments and to what were assumed to be established lines or monuments, yet both frankly conceded that there is much doubt and uncertainty respecting the boundary lines in the town of Bingham Canyon, and no one can say with certainty where any particular line is located upon the ground, including, of course, government lines. Then, again, it appears that the property owners have paid no particular attention to the precise location of their boundary lines, for the reason, as was stated at the trial by some of the witnesses, that the nature of the surface ground was such that a few inches or, in some cases, some feet more or less made no particular difference. The surface ground is shown to be rocky and practically worthless. It is, however, insisted, and the court apparently took that view, that the fence to the northeast of the plaintiff's cottage indicated by the dotted line aforesaid, which had stood there for about 13 years, at the time of the trial was a reliable landmark from which to determine the boundary line between the plaintiff and the defendant. While fences are always to be regarded as impor-

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tant, if not absolutely controlling, in determining boundary lines, yet it does not always follow that the claimants may insist on anything beyond the fence line in either direction. So far as the fence marks the supposed boundary line in this case, it is to be given proper effect as in all cases of disputed boundary lines. What was apparently done, however, by the court was to assume that the true boundary line between the properties of the plaintiff and the defendant continued indefinitely in the direction the fence pointed to the south. It is in making that deduction that we think the court erred. It may, no doubt, be true that the direction in which a fence is constructed is more or less persuasive evidence that the boundary line marked by it for a part of the distance continues beyond the fence in the same direction to the end of the party's land. This is, however, a mere inference, and, under some circumstances, a very weak one. If the fence is placed upon the true boundary line, or if it is known to have been erected as pointing in the direction of that line, the inference may be strong—may even be controlling; but, if it is not placed on the true boundary line, nor erected in the direction of that line, it may perhaps be used only for the purpose of defending any attempted aggression by a neighbor who claims beyond the fence at the point where the fence in fact exists. Such is the case here. The defendant's claim of where the boundary line between him and the plaintiff is located is just as well supported as is the claim of the plaintiff in that regard. One claim, therefore, offsets the other. The plaintiff, however, has the advantage over the defendant in so far as his fence and his house mark the boundary line. The plaintiff has been in actual and undisputed possession of all that part of his parcel of ground upon which his house stands, including the projection of the roof and that which lies west of the fence. Had the fence extended south to the south limit of plaintiff's land, or even to the end of his cottage, he, no doubt, could successfully claim all that portion lying west of the fence by adverse possession, regardless of where the true boundary line between his and the defendant's is located, and irrespective of whether defendant's line, in truth and in fact, extends westward to the broken line as claimed by him. Nor is it a

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fact that plaintiff's right to claim to the boundary line fixed by the court has been acquiesced in by the defendant's predecessors in interest. The evidence shows without dispute that at least one, and possibly two, who owned defendant's property before he obtained the title, as well as the defendant himself, disputed plaintiff's claim to any ground east of the east side of his cottage. Indeed, a Mr. Gibbons, a witness for the defendant, testified that he notified the plaintiff that the fence in question was crowded east beyond the true boundary line. Be that as it may, however, the fact remains that the plaintiff himself admits that he did not know where the boundary line between him and the defendant was located until after defendant's house was at least partially, if not wholly, completed, which was after or at the time the Hansen survey was made for the plaintiff as before stated. The defendant, however, disputed the correctness of that survey and insisted that plaintiff's cottage, in part at least, stood on ground belonging to the defendant, but that he had no desire to interfere with plaintiff's possession nor to encroach upon his ground in any way, but insisted that there was plenty of room for both of them. At all events, he contended that he had not placed, and had not intended to have placed, his dwelling beyond the boundary line, nor even quite up to it. To avoid such a result the defendant had the contractor calculate the exact distance that the dwelling could be placed to the west without encroaching on plaintiff's premises and without extending the roof over the roof of plaintiff's cottage, which was lower than the roof of defendant's house. There is practically no dispute in the evidence that the defendant sought to avoid encroaching upon plaintiff's land, but it is equally clear that the defendant did, to some extent at least, encroach upon plaintiff's premises, and that the roof, particularly at the south end thereof, extends a few inches over the roof of plaintiff's cottage. By referring to the plat the fact in that regard will be made clear.

The plaintiff and his predecessors in interest had been in the actual possession and use of his premises, at least to the extent that same are bounded by the fence and the projection of the roof of his cottage on the east, regardless of where the boundary line was located. Plaintiff had paid the taxes upon

that much at least. The defendant was and is bound to respect plaintiff's right to that extent. In view of the 3  
disputed boundary and the uncertainty of its location, and in view that the premises of the plaintiff and those of the defendant, according to their respective deeds, overlapped, and because there never was an agreed boundary line either express or implied, one must respect the rights of the other to the extent that each has taken actual possession of ground, whether within or without the lines described in their respective deeds, and each must yield to the possessory rights of the other to that extent. To the extent, therefore, that the defendant has projected the roof or the eaves of his dwelling over the roof of plaintiff's cottage, to that extent has the former exceeded his legal rights and has to the same extent invaded the legal rights of the plaintiff.

The defendant insists that a government section line passes across both plaintiff's and defendant's properties at the point and in the direction indicated by the figures 8 and 9 on the plat, and that such line determines the correctness of defendant's survey. Upon the other hand, the plaintiff's counsel strenuously insists, and spent much time at the hearing to convince us, that said section line is located on the ground some distance to the north and outside both properties, and that therefore the plaintiff's survey should control. The very fact that there is such a dispute shows the uncertainty of the boundary lines in the town of Bingham Canyon, and it is that uncertainty which determines the error in the court's conclusions in not limiting the parties to the ground of which they were in actual possession, as pointed out in this opinion.

We remark that, if the conclusions reached by the trial court shall be followed in all cases of disputed and overlapping boundaries in the town of Bingham Canyon, then, in view of the evidence, there would be but few residents who would be certain that they would not be required by some court to remove a portion of their buildings from the premises because claimed by their neighbors, or one or more of them.

It is not true that where, as in this case, boundary lines of coterminous owners overlap, and where there has been a dispute and uncertainty respecting the actual location of such

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lines, the law requires that either the lines as described in the deed of one of the parties or that those described in the deed of the other shall be followed. And what is not 4 required by the law in that regard certainly is not required in equity. In a case like this, where no permanent, in fact no, injury can result to the complaining party by granting him what he is entitled to according to his possessory rights, and injustice would result if more were given, the doubt, if any, may well be resolved in favor of the party on whom unnecessary injury would be inflicted by compelling him to undo what in good faith and under a claim of right he did, although he in some slight degree exceeded the legal limits of his rights. The rules of both law and equity, under such circumstances, can be vindicated and justice reflected by compelling the party in fault to undo that, and that only, which equity and good conscience requires. Even in cases of doubt and uncertainty respecting boundary lines the trespasser may not plead good faith as a defense, yet, in order to avoid a removal of his building, he may rely on the fact that the location of the boundary line between him and his neighbor was uncertain, and the courts, especially courts of equity, may well consider that fact in limiting the other party to his possessory rights, rather than to be governed by the descriptions in his deed, where the lines described therein are shown to be no more reliable than are those described in his neighbor's deed, and where the lines as described in the deeds clearly overlap. In such cases it is still true that "in a moral sense that is called equity which is found '*ex equo et bono*,' in actual justice, in honesty, and in right." We think that natural justice demands that under the circumstances disclosed by this record the parties, in respect to their respective claims against each other, should be limited to their possessory rights. Of course, where the boundaries described in the title papers are tied to reliable and fixed monuments, so that such boundaries can with certainty be located on the ground, one may not go beyond such boundaries and hope to escape from being required to undo what he has done, under the plea that it was done in good faith and by mistake. The invasion of another's property rights in law, if not in morals, constitutes

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a trespass, and the trespasser is civilly liable, whether it occurred in good faith under mistake of fact or law or otherwise. In view of the facts, however, that doctrine has no application here, and we refuse to apply it. The defendant, therefore, should be required to cut off and remove that portion of the eaves of his roof which extend over the roof of the plaintiff's house. While it is shown in the evidence what that distance is at the extreme south end of defendant's dwelling, yet it does not clearly appear just what distance northward from the south end of the roof the projection over plaintiff's roof extends. The court, therefore, should find: (1) Just how far defendant's eaves project over plaintiff's roof; and (2) what distance to the north such projection continued. The defendant should be required within a reasonable time to be fixed by the court to cut off or remove such portion of the eaves of his roof as project over plaintiff's roof; that is, that at least so much of the defendant's projecting roof be removed, so that there shall be sufficient space between the edges of the two roofs to prevent the water dripping from the defendant's eaves from falling perpendicularly onto plaintiff's roof below. That part of the judgment requiring the defendant to pay \$1 damages is approved and affirmed.

The judgment is therefore reversed, and the cause is remanded to the district court, with directions to make findings of fact and conclusions of law in conformity with the conclusions stated in this opinion, and to enter judgment as before stated; neither party to recover costs on appeal.

STRAUP, C. J., and McCARTY, J., concur.

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## FARES v. URBAN.

No. 2718. Decided July 3, 1915. On Application for Rehearing August 5, 1915 (151 Pac. 57).

1. **APPEAL AND ERROR—QUESTION OF FACT—QUIETING TITLE.** A suit under Comp. Laws 1907, Sec. 3511, to quiet title to land, tried as a suit in equity because of the failure of either party to demand a jury, must be considered as a suit in equity by the court on appeal, so far as consideration of the evidence is concerned.<sup>1</sup> (Page 611.)
2. **ADVERSE POSSESSION—ACQUISITION OF TITLE—PAYMENT OF TAXES.** Title by adverse possession cannot be established unless the adverse claim is supported by the payment of all taxes assessed against the property for the statutory period. (Page 612.)
3. **ADVERSE POSSESSION—ACQUISITION OF TITLE—PAYMENT OF TAXES.** A plaintiff suing to quiet title to a parcel fifty by seventy-five feet in a city, and relying on title by adverse possession, does not show payment of taxes by introducing tax receipts describing a tract as "50x75 feet, Heber avenue," where either he or his wife claimed to own property adjoining the property in controversy. (Page 612.)
4. **QUIETING TITLE—APPEAL—HARMLESS ERROR.** Where plaintiff suing to quiet title did not prove any title either in law or in equity, error in finding for defendant on insufficient evidence of title, or in permitting defendant to set up an additional title in supplemental answer, is harmless. (Page 612.)

On Application for Rehearing.

5. **IMPROVEMENTS—COMPENSATION — STATUTORY PROVISIONS.** Under Comp. Laws 1907, Secs. 2021, 2022, providing that, where an occupant of real estate has color of title thereto, and in good faith has made improvements thereon, and is afterwards, in a proper action, found not to be the owner, no execution shall issue to put plaintiff in possession until disposition of a petition for the ascertainment of the value of the real estate and of the improvements, an occupying claimant, finally adjudged not to be the owner, may, after disposition of his appeal adverse to him, file his petition in the trial court to ascertain the value of the improvements made by him. (Page 613.)

Appeal from District Court, Third District; Hon. *F. C. Loofbrow*, Judge.

<sup>1</sup>*Gibson v. McGurkin*, 37 Utah, 153, 106 Pac. 669.



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Fares v. Urban, 46 Utah 609.

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Action by Joseph Fares against Rachel Urban.

Judgment for defendant. Plaintiff appeals.

**MODIFIED AND AFFIRMED.**

*Evans, Evans & Folland* for appellant.

*Snyder & Snyder* for respondent.

### RESPONDENT'S POINTS.

Until plaintiff, by some act, showed an intention to claim the land adversely by paying taxes on it, by a description that would apprise the owner of such intention, he is, under our statute, presumed to be in subordination to the legal title. (Comp. L. of Utah, 1907, Sec. 2861; *Sheppick v. Sheppick*, 44 Utah 131, 138 Pac. 1169.) "The law presumes that the owner of the legal title is in the constructive possession, and entitled to the actual possession." (*Gibson v. McGurkin*, 37 Utah 158; *Ives v. Grange*, 42 Utah 608, 134 Pac. 619.) The burden is upon the plaintiff to show an adverse possession of the precise land in controversy and all of it, for the statutory period of seven years. (*Needham v. Salt Lake City*, 7 U. 319; *Smith v. North Canyon Water Co.*, 16 U. 194; *Funk v. Anderson*, 22 U. 238; *Center Creek Irrigation Co. v. Lindsay*, 21 U. 192; *Dignan v. Nelson*, 26 U. 186; *English v. Openshaw*, 28 U. 241; *Ry. Co. v. Investment Co.*, 35 U. 528.) It seems settled by good authority under similar or identical statutes that when the owner of the record title pays the taxes, a payment by the adverse claimant is unavailing. (*N. P. Ry. Co. v. Littlejohn*, 198 Fed. 700; *Com. National Bank v. Schlitz* (Cal.), 91 Pac. 750; *Carpenter v. Lewis*, 119 Cal. 18, 50 Pac. 925.) It would seem to follow that if it is important who paid first, the burden is upon the adverse claimant to show that he paid first. All presumptions are in favor of the holder of the legal title. (*Evans v. Welch*, 29 Colo. 355, 64, 68 Pac. 776, 9; *Fleming v. Howell*, 125 Pac. 551.)

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FRICK, J.

The plaintiff commenced this action against the defendant pursuant to Comp. Laws 1907 section 3511, to quiet the title to a parcel of land 50x75 feet in Park City, Summit County, Utah. The complaint is quite brief, and is in the usual form in such actions. The defendant answered the complaint, also claiming title to the westerly 25x75 feet of the property in question by adverse possession. She subsequently, over plaintiff's objection, was permitted to file a supplemental answer in which she also claimed title by a deed of conveyance to the 25x75 feet, and at the trial produced said deed, and thereunder claimed title from the grantee of the original patentee. The plaintiff neither pleaded nor proved a record title, but relied upon his claim of adverse possession. The court to whom the case was submitted made findings of fact and conclusions of law in favor of the defendant. A judgment quieting the title to the 25x75 feet claimed by her was accordingly entered, and the plaintiff appeals.

Primarily, defendant's counsel contend that we cannot consider appellant's assignments relating to the sufficiency of the evidence, for the reason that the action, although denominated equitable, is nevertheless one at law, for the reason that it is, in legal effect, an action in ejectment. It is argued, therefore, that we are bound by the court's findings, unless there is an entire lack of evidence in support of any material finding. The question respecting the right of a party to sue in ejectment or under section 3511, *supra*, was considered and decided contrary to counsel's contention in *Gibson v. McGurrian*, 37 Utah, 158, 106 Pac. 669. As is there intimated, if either party desires to exercise his right to a jury trial, he must demand a jury as required by our statute, and if he fail to do that at the proper time and in the proper manner, and if he try the case as an action in equity, the case must be considered as such by us.

Proceeding, therefore, to a consideration of appellant's assignments, we remark that they practically all relate to the findings of fact. It is insisted that the court erred in its findings of fact, for the reason that the evidence does not support

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the findings. It is needless to set forth the evidence except to say that the appellant did not attempt to establish a record title to any part of the 50x75 feet claimed by him, but relied entirely upon his claim of adverse possession and the payment of taxes for the period required by our statute. Under our statute title by adverse possession cannot be established unless the adverse claim is supported by the payment of all taxes that are assessed against the particular property claimed for the period prescribed by the statute. Now, in this case appellant wholly failed to prove that he paid the taxes on the particular 50x75 feet claimed by him for the time required by the statute. In that regard the only description of the land now claimed by appellant as given in the tax receipts produced by him in evidence is as follows: "50x75 feet, Heber avenue." The evidence conclusively shows that either appellant or his wife claimed to own property adjoining the aforesaid 50x75 feet on the east, and hence the tax receipts introduced are of little, if any, significance. This is made more apparent still from the fact that it is made to appear from the evidence that respondent also had tax receipts which she claimed referred to the same property, that is, to the west half of said 50x75 feet, in which the description is just as vague and uncertain as it is in appellant's receipts. 2, 3

Appellant thus failed to prove title by adverse possession, and, since he also failed to prove any other title, the court was clearly justified in finding against his claim of title. Then, again, appellant's right of possession as well as possession were disputed, and the evidence upon that phase of the case is not only sufficient to justify a finding against his claim of adverse possession, but we think the finding is in accordance with the weight of the evidence. If it were conceded, therefore, that respondent had failed to prove a good title, or that the court had erred, as claimed by appellant, in permitting her to set up an additional title in her supplemental answer, yet it must also be conceded that her title is certainly good as against appellant, since he established no valid claim or title, either in law or in equity, and for that reason also any error the court may have committed 4

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in the particular just stated could not have affected, and did not affect any of his rights.

The judgment therefore should be, and it accordingly is, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

ON APPLICATION FOR REHEARING.

FRICK, J.

Appellant has filed a petition for rehearing, but for the purpose only of obtaining a modification of the judgment which we have affirmed.

Appellant's counsel now contend that the judgment in favor of respondent is too broad, in that it does include the improvements placed on the premises in controversy the title to which has been quieted in the respondent. The judgment reads as follows:

"That the defendant is the owner, in the possession, and entitled to the possession of the lands described in her supplemental answer herein, and in the foregoing findings of fact, as herein set forth, and her title to said land is 5 hereby quieted and confirmed against said plaintiff and all the world, and she is hereby decreed to be the owner thereof."

The court, however, also added:

"That said plaintiff and all persons claiming by, through, or under him are hereby debarred and foreclosed from any claim, right, or interest in said lands, or any part or portion thereof *or the improvements thereon.*"

As pointed out in the original opinion, the action was brought to quiet title in appellant. While the respondent denied appellant's title, she also counterclaimed and asked that the title be quieted in her. Appellant's counsel now contend that the judgment under the issues and under our statute should have been limited to the land itself, exclusive of the improvements thereon, and that therefore the judgment /

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should be modified by excluding therefrom the four italicized words, "*or the improvements thereon.*" Respondent's counsel insist that appellant, having failed to make any claim for the improvements in the original action, is now estopped from doing so; in other words, it is contended that the matter of improvements is included in the former judgment, and is therefore *res adjudicata*. We cannot yield assent to that contention. We have an occupying claimant statute (Comp. Laws 1907, section 2021, 2022) which, so far as material here, provides:

"Sec. 2021. Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the plaintiff in possession of the same after the filing of a petition as herein-after provided, until the provisions of this chapter have been complied with.

"Sec. 2022. Such petition must set forth the grounds on which the defendant seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried as in ordinary actions, and the value of the real estate and of such improvements must be separately ascertained on the trial."

(The Legislature, in giving relief to occupying claimants, could, as a matter of course, prescribe any reasonable procedure it saw fit. The intention of the statute is clear that the occupying claimant need not prefer his claim until he "is afterwards in a proper action found not to be the owner" of the land in controversy. In section 2022 it is also made clear that the party who is found to be the owner of the land need not present any defense with respect to improvements until the petition provided for by section 2021 has been filed. The owner may then join issue with the petitioner on the question of whether or not the latter is entitled to the improvements under the statute, and in case he is found to be the owner thereof the value is then determined. The question of the ownership of the improvements in question in the present ac-

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tion was, therefore, not in issue under our statute, and hence the judgment in that regard is too sweeping. The appellant was not required to file the petition for improvements until it was finally determined whether he or the respondent was found to be the owner of the land in controversy. Upon that question he had the right to appeal to this court, and was entitled to our judgment upon the facts. He, under the statute, cannot be required to file a petition for improvements until the remittitur of this court affirming the judgment below is sent down to the trial court. Of course, if he had elected not to appeal, he would have been required to file his petition after the judgment was entered against him in that court. The duty to file a petition is, however, suspended until the appeal is finally determined and the remittitur has gone down. We think the judgment therefore should be modified as prayed for by appellant.

By anything we have said or omitted to say we do not wish to be understood as holding, or even intimating, that the appellant has a legal claim for improvements under our statute. That is the very question which must be determined when the petition required by the statute is filed. Before a petition is filed that question is not involved in the action. It is for that reason, and for the reason that the appellant may be given an opportunity to exercise his statutory right to have the question of improvements determined, that the judgment is modified. While in view of our statute the question of *res adjudicata* may not be involved, yet in order to avoid controversy we deem it best to modify the judgment. The judgment is therefore modified by eliminating therefrom the four words "or the improvements thereon," and in all other respects it stands affirmed.

Appellant also asks for a modification of the judgment for costs, but we can see no reason why that should be granted since the judgment below is affirmed.

That order therefore also stands affirmed.

STRAUP, C. J., and McCARTY, J., concur.

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## WARD v. SALT LAKE CITY.

No. 2756. Decided July 19, 1915. Rehearing Denied August 5, 1915  
(151 Pac. 905).

1. MUNICIPAL CORPORATIONS—TORTS—DEFECTS IN STREETS. Where a municipal corporation, in the paving and guttering of streets, and in constructing sidewalks and crosswalks, adopted and followed a plan prepared by a competent civil engineer, it was not liable for injuries to a pedestrian who stepped into a gutter filled with water from rain, receiving a fall thereby, since whether the municipality has followed a plan drawn by a competent person for the making of public improvements is the test of its liability.<sup>1</sup> (Page 621.)
2. MUNICIPAL CORPORATIONS—TORTS—INJURIES TO PEDESTRIAN FROM GUTTER—PROXIMATE CAUSE. Where a pedestrian, in crossing a street deflected from the straight course, so that she stepped into the uncovered part of defendant city's gutter, which was filled to overflowing with a heavy rain, so as to conceal the fact that such part was uncovered, the pedestrian's act in turning aside, not the overflowing of the gutter, was the proximate cause of the accident. (Page 623.)
3. NEGLIGENCE—PLEADING. Under the code system of the state, a pleader may allege in a single statement as many acts of negligence relating to one transaction or accident as he may rely on, and upon trial he need only prove one of the acts, if the act proved is sufficient to entitle him to recover. (Page 624.)

Appeal from District Court, Third District; Hon. C. W. Morse, Judge.

Action by Amanda E. Ward against Salt Lake City.

Judgment for plaintiff. Defendant appeals.

REVERSED, and cause remanded, with directions to grant new trial.

*H. J. Dininny*, City Atty., *Aaron Myers* and *W. H. Fol-  
land*, Asst. City Attys. for appellant.

*A. T. Sanford* and *G. M. Sullivan* for respondent.

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<sup>1</sup>*Morris v. Salt Lake City*, 35 Utah 485, 486; 101 Pac. 373.

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The following are the cases cited in appellant's brief, referred to by the court in the opinion: *Lansing v. Toolan*, 37 Mich. 153; *Teager v. Flemingsburg*, 109 Ky. 746, 60 S. W. 718, 22 Ky. Law Rep. 1442, 53 L. R. A. 791, 95 Am. St. Rep. 400; *Gould v. Topeka*, 32 Kan 485, 4 Pac. 822, 49 Am. Rep. 496; *Watters v. Omaha*, 76 Neb. 855, 107 N. W. 1007, 110 N. W. 981, 14 Ann. Cas. 750; *Shippy v. Au Sable*, 65 Mich. 494, 32 N. W. 741; *Kemp v. Des Moines*, 125 Iowa, 640, 101 N. W. 474; *Breckman v. Covington*, 143 Ky. 444, 136 S. W. 865; *McCourt v. Covington*, 143 Ky. 484, 136 S. W. 910; *Kelsey v. New York*, 123 App. Div. 381, 107 N. Y. Supp. 1089; *Owen v. New York*, 141 App. Div. 217, 126 N. Y. Supp. 38; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 91, note; *Monk v. New Utrecht*, 104 N. Y. 552, 11 N. E. 268; *Betts v. Gloversville*, 56 Hun. 639, 8 N. Y. Supp. 795; *Roach v. Ogdensburg*, 80 Hun. 467, 30 N. Y. Supp. 450; *Rhineland v. Lockport*, 60 Hun. 582, 14 N. Y. Supp. 850; *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051; *Augusta v. Little*, 115 Ga. 124, 41 S. E. 238; *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526; *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460; *Peru v. Brown*, 10 Ind. App. 597, 38 N. E. 223; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *White v. Yazoo City*, 27 Miss. 357; *Healy v. Chicago*, 131 Ill. App. 183; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75; *Mills v. Brooklyn*, 32 N. Y. 489.

FRICK, J.

The plaintiff recovered judgment against the defendant city for personal injuries sustained through the alleged negligence of the city in not maintaining the sidewalk and gutter on a certain street intersection in a reasonably safe condition. The city appeals from the judgment.

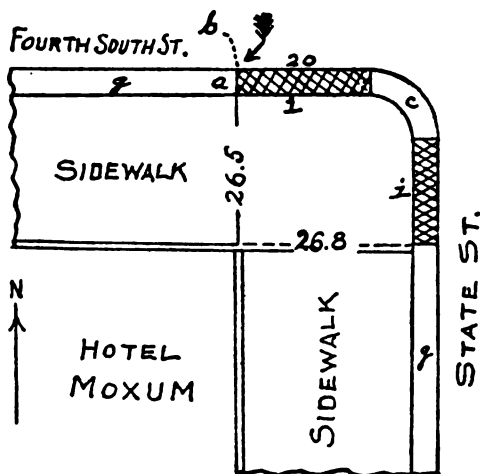
The evidence relating to the alleged negligence is brief and without conflict. To aid the reader to better understand the conditions of the gutter and sidewalk at the point of the accident, and to make more clear just what the plaintiff claims, we append the following plat:



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The plaintiff, in substance, testified that on the 1st day of March, 1914, at about 11 o'clock at night, and while it was raining rather hard, she left the theater on Third South street, which was located a block north and a little west from where the accident occurred; that from there she went west to Main street, thence south on Main to Fourth South street, thence east on the north side of said street to the middle of the block, at which point she turned south to cross that street in order to reach her home, which was immediately south on a side street running north and south; that when she reached the street car track in the center of Fourth South street running east and west she discovered that she could not cross to the south side of that street without getting her feet wet on account of the water in and near the south gutter on Fourth South street; that she then turned back to the north side of the street and walked down on that side to the west side of State street, and on reaching that point she crossed over on the west side of State street, and when she arrived at the point of the large arrow marked "b" on the plat she deflected to the west, as indicated by the curving of the arrow, and stepped into the gutter at the point marked "a" on the plat. She testified further that the gutter was overflowing with water at the time, so that she could not see where the covering over it ended. The gutter, she said, was 15 inches wide and

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about 13 inches deep at the point marked "a" and where she stepped into it, and that the water ran over the iron plates covering the gutter and also over the sidewalk and over the street pavement. Stepping into the gutter caused the plaintiff to lose her balance and fall forward to the south onto the concrete sidewalk, and in falling she sustained the injuries complained of. It was made to appear from the testimony of the doctor, who at the time was in the Moxum Hotel, and who was called to attend to the plaintiff's injuries, that on the night of the accident, as he put it, "there was a heavy combined rain and snow going on that evening; I think it began about ten minutes after seven;" and it is conceded that the rain continued falling until about eleven o'clock, during which time about one-half of an inch of water fell, by reason of which the street in question was flooded.

Referring now to the plat again, the letters "g" "g" indicate the open portions of the gutters, which are constructed of concrete, and are of the width and depth before stated. The shaded portions marked "i" "i" are iron plates twenty feet in length covering the gutters "g" "g," and the portion marked "c" is a solid concrete covering over that portion of the gutter as indicated. The figure "26.5" and "26.8" constitute the width of the sidewalk, which is constructed of concrete or cement, and which extends from the building or lot line to the gutters "g" "g." The plaintiff thus had a safe passageway of 26.8 feet over which she could have passed safely at any point within that distance. She testified that the water was flowing over the iron plate, and thus she could not see where the plate ended, and thus in deflecting her course to the west, as indicated by the large arrow "b," she stepped into the gutter.

It is contended that the city was negligent in not having the gutter covered farther to the west so as to prevent pedestrians from stepping into it in case the gutter was flooded, and that it was also negligent in constructing the gutter in the form and depth it was constructed. On the part of the city it was shown without conflict just what the width of the concrete sidewalks were at the point in question as indicated on the plat; that the paving, the gutters, the covering thereon,

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and the sidewalk were all constructed in accordance with a plan prepared and recommended by a competent civil engineer, which plan was duly adopted and followed by the city in improving its streets and in constructing the gutters, sidewalks, etc., including those in question here. The theory upon which the case was tried and submitted to the jury by the trial court is well illustrated by the following instruction to the jury:

"The court instructs you that it is the duty of the city to use reasonable care and diligence to install such crossings, curbs, and sidewalks as are reasonably safe for pedestrians using them, and use reasonable diligence to keep them reasonably safe, and it is for you to consider and determine whether the condition existing at the place of the injury was reasonably safe and secure for pedestrians using the street and in so determining you may take into consideration the location, whether or not it was at a point which was in or near the busy business section of the city, and whether it was at a point where a great many pedestrians used it, or a point where few used it, and, if you find from a preponderance of the evidence that the defendant city did not use such reasonable care and diligence, and that such failure was the proximate cause of plaintiff's injury, then your verdict should be for the plaintiff, unless you should find that she was guilty of contributory negligence as is herein defined."

It will thus be seen that the court submitted the whole question respecting the construction of the gutters and coverings thereon to the jury, and allowed them to determine what, in their judgment, would constitute proper gutters and a sufficient covering for them for pedestrians to pass over safely, although there was no allegation nor proof that the plan adopted by the city as aforesaid was insufficient or defective, or that it was negligently or defectively executed in any particular. The city excepted to the foregoing instruction, as well as to others based on the same theory, and in its brief urges that the court erred in submitting the case to the jury upon the theory outlined in the instruction we have set forth at large, or upon any theory, under the undisputed evidence.

It seems to us that under the undisputed evidence the ver-

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dict and judgment cannot prevail. It has frequently been held by the courts—indeed, so far as we are aware, there is little, if any, diversity of opinion upon the proposition—that a municipality may adopt and follow a plan prepared by a competent civil engineer in making public improvements, including the paving and guttering of streets and in constructing sidewalks and cross-walks, and that the question of whether such plans are sufficient or proper cannot be reviewed by the courts, except upon the grounds pointed out by us in the case of *Morris v. Salt Lake City*, 35 Utah, 485, 486, 101 Pac. 373, and cases there cited. A municipality, as a matter of course, is liable for a negligent execution of its plans, or for permitting the improvements which are constructed in accordance therewith to be out of repair or to become unsafe. It may, however, not be sued because some citizen, or many of them for that matter, may think that the public improvement, although constructed according to the plans adopted and followed as aforesaid, are unsafe or could be improved. Where public improvements are constructed in accordance with a plan prepared and adopted as aforesaid, the city is liable only in case the improvement, when constructed in accordance with such plan, is clearly insufficient or unsafe. The rule with respect to streets and sidewalks is stated by Mr. Chief Justice Campbell in his usually clear style in *Shippy v. Village of Au Sable*, 65 Mich. 500, 501, 32 N. W. 744, in the following words:

“All municipal ways must be put under the supervision of the public authorities. It is for them to decide what works shall be undertaken, and how the general safety and convenience require them to be built. There must be some final arbiter as to the proper way of doing this. In many cases plans more or less formal must be considered, and taxes or assessments levied to complete them. If it can be referred to a jury to determine on the propriety of such action, there will be as many views as there are juries, and it can never be definitely known when a municipality is safe. It is beyond human ingenuity to devise a plan which is not capable of danger to heedless persons, or to young children, who cannot be expected to appreciate the danger. Reasonable safety is what the law requires, and no more.”

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The principle stated by the Chief Justice is followed by the Supreme Court of Nebraska in *Watters v. City of Omaha*, 76 Neb. 855, 107 N. W. 1007, 110 N. W. 981, 14 Ann. Cas. 750. In that case it was made to appear that the board of public works of Omaha had adopted the plans of competent engineers, and had constructed the improvement in accordance therewith. The court, at page 857 of 76 Neb., at page 1008 of 107 N. W. (14 Ann. Cas. 750), says:

"When that course has been pursued in good faith, and the work has been carried on and completed as planned and specified, the municipality should not be held responsible, unless the structure is so manifestly dangerous that all reasonable minds must agree that it is unsafe."

A large number of cases in which the foregoing principles are illustrated and applied by the courts are cited in appellant's brief, all of which will be found in the reporter's citations which precede this opinion, and we shall, therefore, not specially refer to the cases here. It has also been held by numerous decisions that under the conceded facts here the city was not guilty of negligence. In *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096, in passing on a similar question, it is said:

"A municipality is not liable for personal injuries caused by a fall into an uncovered gutter at a street crossing, where it appears that the gutter was reasonably safe, and that the open gutter is a common, approved method of construction at crossings in cities and boroughs."

The cases of *Brantz v. Fargo*, 19 N. D. 538, 125 N. W. 1042, 27 L. R. A. (N. S.) 1169; *Town of Spencer v. Mayfield*, 43 Ind. App. 134, 85 N. E. 23; *Gallagher v. City of Tipton*, 133 Mo. 557, 113 S. W. 674; *Hays v. City of Columbia*, 159 Mo. 431, 141 S. W. 3; *Rome v. Cheney*, 114 Ga. 194, 39 S. E. 933, 55 L. R. A. 221, and *Lansing v. Toolan*, 37 Mich. 153, are all directly in point. In a number of those cases the width of the sidewalks and gutter coverings are given, and in some instances were much less than one-fourth of the width of the coverings in question, and yet it was held as a matter of law that, where it was shown without conflict that the walk, gutters, and coverings were constructed in accordance with an ap-

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proved and adopted plan, the municipality was not guilty of negligence either in constructing or in maintaining them. It is needless to cite further authorities upon a proposition which, to our minds, admits of no controversy in the light of the conceded facts. Here the plaintiff had a safe passageway at least 26 feet in width. She herself testified that the gutter was covered over with iron plates up to a point which was even with the outer wall of the Moxum Hotel Building. How much farther should the city have covered the gutter? If such matters shall be left to juries, one might say five, another ten, and still another twenty feet. At all events, one jury, the jury in question, said that walk or crossing of twenty-six feet in width was insufficient. Who can say, therefore, what number of feet would be sufficient? The verdict, however, plainly shows that when juries are permitted to depart from the plans which have been approved by competent civil engineers the whole matter with them becomes one largely of caprice or conjecture. The question, therefore, is not one of feet, but it is whether the improvement has been constructed according to a plan which was prepared by a competent civil engineer who is skilled and conversant with what is reasonably sufficient and necessary in such matters, and whether the plan was followed. Where such is the case, the law assumes that the plan is a proper and reasonable one, and that the structure which conforms to the plans and specifications is reasonably safe until the contrary is clearly made to appear. This is but common sense.

It is also contended in appellant's brief that the overflowing of the water in the gutter was not the proximate cause of the accident. It seems to us this contention is well taken. We cannot see how the overflowing of the gutter caused the plaintiff to deflect from the sidewalk or crossing and step into the gutter. Of course, she says the water concealed the end of the iron plates covering the gutter; but she also 2  
says that the water ran all over the street paving at the point in question. The same condition, therefore, prevailed both to the east and to the west of where she was crossing. How then did the water cause her injury? If the overflow of the water had in some way flooded plaintiff's

premises and had caused her damages, we could understand how the flooding, if due to the city's negligence, might be considered the direct, the proximate, cause of the damages complained of. We cannot perceive, however, how the overflow caused the accident and consequent injury. Certainly, the water did not cause plaintiff's injury. If snow had drifted into the gutter, or if for any other reason the end of the iron plates had been concealed from her view, the claim, no doubt, would then be that those things were the proximate cause of the accident. The proximate cause of the accident was plaintiff's own conduct in departing from a straight course and stepping into the uncovered gutter. Can it be said that where there is a safe path of twenty-six feet in width provided for the pedestrian that he may wander off to either side simply because a rainstorm has produced a temporary flood over the path, and that he may step into a gutter at the side of the path, and then complain that the path is of insufficient width?

Another assignment relates to the manner in which the acts of negligence are stated in the complaint. It is argued by the city that, inasmuch as the plaintiff had commingled several acts of negligence in a single statement or cause 3 of action, and had failed to prove all of the acts as alleged, therefore the court erred in submitting the case to the jury, for the reason that the plaintiff had failed to prove a cause of action. There is nothing in this contention. It is well settled in this jurisdiction, and we think in all others having a code system, that a pleader may allege as many acts of negligence as he may rely on in a single statement and upon the trial he need only prove one or more of the acts if the act proved is sufficient to entitle him to recover. Of course, the several acts of negligence contemplated in the foregoing statement must relate to one transaction or accident. If they do not, they should be pleaded as distinct causes of action. A single accident, however, may be the culmination or result of a number of negligent acts or omissions or both, and when such is the case the several acts or omissions, as the case may be, which are alleged to constitute the negligence complained of, may all be included in a single cause of action or statement, and only so much of the charged

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negligence need be proved as will entitle the plaintiff to recover.

It is also insisted by the city that the notice required by our statute, and which was served in this case, is insufficient. We think that under the circumstances disclosed by the record the notice in question is clearly sufficient, and that question, therefore, requires no further discussion.

For the reasons stated, the judgment is reversed, and the cause is remanded to the District Court of Salt Lake County, with directions to grant a new trial, and to proceed with the case in accordance with the views herein expressed; appellant to recover costs on appeal.

STRAUP, C. J., and McCARTY, J., concur.

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ARKOOSH, et al., v. SORRENSON.

No. 2740. Decided July 12, 1915. Application for Rehearing, August 6, 1915 (150 Pac. 959).

1. **MINES AND MINERALS—MINING CONTRACTS—CONSTRUCTION.** Where a mining contract obligated defendant to work and have employed in the construction of a tunnel at least four men per day working twenty days per calendar month, it was not a compliance with the stipulation for defendant to have employed a less number of men working a greater number of hours than the usual mining day, though the total of the hours of work on the tunnel was equal to eighty regular mining days. (Page 627.)
2. **MINES AND MINERALS—CONTRACTS—RIGHT TO MINERALS.** Defendant was engaged to drive a tunnel in a mine under a contract providing that he should have the right to dispose of all the ore excavated within the four lines of the tunnel, but should not be allowed to stope any veins, lodes or ledges without the agreement in writing of plaintiffs. The contract further provided that defendant should have the right to drive other and smaller tunnels and to stope any and all veins, but that 60 per cent. of the proceeds of the ores should go to plaintiffs. Plaintiffs claimed ore taken from the mine by defendant, and defendant's witnesses testified that the ore was taken from an old tunnel

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or stope which had for a long time existed on the mining claim. *Held* that, under the contract, plaintiffs were entitled to the ore; defendant not claiming it under the share clause of the contract. (Page 630.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by J. George Arkoosh and another against George N. Sorrenson.

Judgment for plaintiffs. Defendant appeals.

**AFFIRMED.**

*P. T. Farnsworth, Jr.*, for appellant.

*Booth, Lee, Badger, Rich & Parke*, for respondents.

**FRICK, J.**

This action was commenced by the plaintiffs in the District Court of Salt Lake County to recover a certain carload of ore which, it is alleged in the complaint, the defendant, Sorrenson, had wrongfully removed from certain mining claims, and which ore it was alleged belonged to the plaintiffs. The defendant denied the plaintiff's right to or ownership of the ore sued for, and claimed to be the owner thereof by virtue of a certain contract entered into between him and the plaintiffs, which contract he set forth in full as a part of his answer. The defendant also set up a counterclaim in which he claimed damages for the alleged breach of the contract aforesaid by terminating defendant's rights thereunder and by excluding him from the mining claims mentioned in said contract, and therefore preventing him from ultimately acquiring ownership of the forty per cent. interest in the mining claims mentioned in the contract. At the hearing the court sustained plaintiffs' motion for a nonsuit against defendant's counterclaim, and after all the evidence was submitted by both sides it, upon plaintiffs' motion, also directed the jury to return a verdict in favor of plaintiffs to the effect that "said plaintiffs are entitled to the car of ore in dispute, and to the

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proceeds thereof." Judgment was entered accordingly, from which judgment the defendant appeals.

The principal difference between the parties arises out of the terms of the contract pleaded by the defendant. Omitting the formal or introductory parts, and those portions not material, the contract reads as follows:

"Now, therefore, it is agreed by the respective parties hereto for and in consideration of the premises herein contained as follows: The said parties of the first part agree to transfer to the said part of the second part at the end of one year from the date hereof, and upon the completion of all of the work and labor to be performed by the 1 said party of the second part upon the said property above mentioned as is more fully set out hereinafter a forty (40) per cent. share in and to said properties, and the said parties of the first part to allow the said party of the second part to perform the said work and labor hereinafter mentioned. The said party of the second part agrees, for and in consideration of the premises herein contained, to drive a tunnel horizontally through the Comet Fraction, New York and Boston claims, as above mentioned, a distance of one thousand (1,000) feet, said tunnel to be five and one-half (5½) feet by six (6) feet and timbered when necessary, finished and completed in a thorough and workmanlike manner. The entrance to said tunnel to be placed at the most advantageous point on the New York claim as above mentioned. *The said party of the second part agrees to work and to have employed in the construction of said tunnel at least four men per day, working twenty (20) days per calendar month.* The said party of the second part agrees to commence work upon said tunnel not later than November 10, 1912, said tunnel to be completed by not later than November 10, 1913.

"It is further agreed that the said party of the second part shall have the right to dispose of all of the ore encountered and excavated within the four lines of said tunnel, but party of the second part shall not be allowed to stope any veins, lodes, or ledges without the agreement in writing of the parties of the first part.

"It is further provided that the said party of the second

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part shall have the right to drive other and smaller tunnels in any and all portions of the above claims as above mentioned and to stope any and all veins, lodes, and ledges encountered; forty (40) per cent. of the net proceeds thereof going to the said party of the second part and sixty (60) per cent. of the net proceeds thereof going to the said parties of the first part, with provisions in regard to the smelter tests and access to the workings as above stated. \* \* \*

“And it is further agreed between the parties hereto that, if the said party of the second part shall fail to perform the work and labor within the time and in the manner hereinbefore specified, or shall fail to comply with the terms of this contract in any manner, then the same shall immediately cease and become null and void, and all the rights of the party of the second part hereunder shall terminate.” (*Italics ours.*)

The plaintiffs at the trial contended: (1) That the defendant had failed to comply with the terms of the contract aforesaid, and therefore they had elected to and had terminated the same, and the defendant thereby had lost all rights under it; and (2) that the ore in question had been mined and taken from a portion of the mining claims from which the defendant had no right to take or remove ore. The plaintiffs at the trial proved that the defendant did not “have employed in the construction of said tunnel at least four men per day working twenty (20) days per calendar month.” The defendant conceded at the trial, and conceded, through his counsel, at the hearing, that during some of the time he had less than four men working in said tunnel. Indeed, he admitted that during part of the time he had only one man working therein. He contends, however, that eight hours constitute a shift; that a shift constitutes a day; and that when the eight-hour shifts that were worked in the tunnel are all added together he did, in fact, work what he calls “twenty shifts” in each calendar month. In arriving at that result he, however, is compelled to have one man work more than a shift each day. In that connection he contends that some days one man worked more than eight hours, and thus worked more than one shift. He therefore insists that he is entitled to add all of the shifts together, and if by doing so he did work eighty shifts in each

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calendar month, that then he has complied with the terms of the contract. We do not so construe the italicized portion of the contract. All the terms of the contract must be considered together. The language is that the defendant must employ in said tunnel "at least four men per day." True, the four men need only work twenty days in each calendar months, but that does not mean that the defendant need only employ two men, each of whom should work sixteen hours each day for twenty days in each month, or, if they worked thirty days, to work proportionately less hours. The contract provides that "at least four men per day working twenty (20) days" in each month, and not for eighty shifts of work in each month by less than four men. It requires no argument to show that four men working eight hours each day in a mine who are competent miners will accomplish more in the long run than two men working sixteen hours each day in the same mine, and especially in forcing a tunnel through solid rock. We are of the opinion, therefore, that the District Court did not err in construing the contract to the effect that under the defendant's own admissions at the trial he had not complied with its terms, in that he had failed to keep employed in the tunnel the number of men he was required to employ. That the parties to the contract themselves so construed the language of the contract when it was executed is to some extent borne out by the facts that it was made to appear at the hearing that in multiplying shifts as the defendant had done it was utterly impossible for him to complete the tunnel within the time limited. If, therefore, the defendant himself, breached the terms of the contract in the particulars just stated, the plaintiffs had the right to terminate the same and to exclude him from the property, as he claims they did, before bringing this action. The defendant, therefore, had no cause of action for damages for breach of the contract, and the court committed no error in sustaining the motion for a non-suit.

Defendant's counsel, however, vigorously argues that the court erred in directing a verdict for the plaintiffs for the ore in question. As appears from the contract, the defendant was entitled to all the ore he "encountered and excavated

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within the four lines of said tunnel"; that is, any ore which formed part of the cubical contents of the tunnel as it was to be constructed belonged to the defendant. He, however, was not allowed "to stope any veins, lodes, or ledges without the agreement in writing of the parties of the first part," the plaintiffs. By another provision of the contract he was given "the right to drive other and smaller tunnels in any and all portions of the above claims as above mentioned, and to stope any and all veins, lodges, and ledges encountered." As we understand defendant's counsel, he contends that the ore in question comes within the clause of the contract we have just quoted, and therefore belongs to the defendant. But here again the defendant is bound by the testimony of his own witnesses. Taking their testimony, there is no room for doubt that the ore in question was, in fact, taken from an old tunnel or stope which for a long time had existed on the mining claims. Without pausing, however, to analyze the evidence, let us consider the defendant's right to the ore in the light of the plain provisions of the contract and in view of the basis of his claim thereto that he made at the trial. Referring to the contract, it is, of course, elementary that all of its parts must be considered and construed together. We think the several parts of the contract relating to the right of the defendant to mine and remove ore are clear and unambiguous. In the first place, all the ore which was encountered as part of the cubical contents of the main tunnel belonged to the defendant. In addition to that, the defendant was permitted to run smaller tunnels upon the mining claims, and, if he did so, then he could stope all veins and lodes encountered in said tunnel, but, if he stoped any ore therein, he was required to yield up sixty per cent. of the proceeds thereof to the plaintiffs. True, with the written consent of the plaintiffs, he could also stope any veins or ledges other than those specially mentioned in the contract. The defendant does not claim that the ore in question was "encountered" in the main tunnel. Neither can he successfully claim that the ore in question came from any "other smaller tunnels" which he was authorized to drive on the mining claims, for the reason that if he did he was, by the

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terms of the contract, compelled to yield up sixty per cent. of the net proceeds thereof to the plaintiffs, and he, at the trial, claimed, and at the hearing contended, that they are not entitled to any part of the ore in question, but that it all belongs to him. Inasmuch, therefore, as it must be conceded that the ore in question was not "encountered" in the main tunnel, and that it was not taken from any one of the "smaller tunnels," the defendant's claim to the ore must fail. He certainly cannot successfully contend that under the terms of the contract he was entitled to the ore if it came from any "stope, veins, or ledges" other than those "encountered" in any of the smaller tunnels, because he was expressly forbidden from mining or removing any ores from any "stope, veins, ledges, or lodes," except from the main tunnel, or the smaller tunnels, without the written consent of the plaintiffs. He does not pretend he had any consent, nor does he rely upon any such claim. Merely having recourse to the plain provisions of the contract and to the claim of the defendant that the ore in question was not encountered in the main tunnel, and could not have been in any smaller ones run by him, because he claimed all of it, and not only forty per cent. of the net proceeds which would be his share, disposes of his claim to the ore.

We do not see how the trial court could escape from the foregoing conclusions, and hence it did not err in directing a verdict in favor of the plaintiffs for the ore in question. If the matter, however, be viewed in the light of the evidence, we cannot see what could have been submitted to the jury, and for that reason the result would still have been the same.

In view that plaintiffs were entitled to recover the ore in question, as a matter of law, for the reasons stated, the other errors complained of by the defendant, whichever way decided, could not affect or change the result, and hence we need not consider them.

The judgment is therefore affirmed, with costs to the plaintiffs.

STRAUP, C. J., and McCARTY, J., concur.

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## On Application for Rehearing.

FRICK, J.

A petition for a rehearing is filed in which counsel for appellant insists that we have seriously erred in our conclusions. He says:

"This court is wholly in error in the statement contained in its opinion that the car of ore in question 'was not taken from any one of the smaller tunnels.' Positive testimony of two witnesses produced by appellant upon the trial is that said ore was taken from another and smaller tunnel, the ore being encountered after driving a 4x5-foot tunnel a distance of from 4 to 6 feet."

If counsel were correct in his statement that two witnesses had unconditionally testified as indicated in the foregoing quotation, then, in view that the court directed a verdict against appellant, there would be merit to counsel's contention. The witnesses referred to, however, in describing the place where the ore was taken from, left no room for doubt that it was not taken from a "tunnel" driven by the appellant as provided in the contract, but that it was "stoped" from an old drift or tunnel, and was therefore taken from a place where the appellant had no right to take ore. The situation, therefore, is not, as is assumed by counsel, that there is some substantial evidence in favor of the party against whom a verdict was directed, but it is a case where the testimony of the party's own witnesses shows that he has taken the very thing he claims as his from his adversary's property, and therefore has no right thereto.

The next contention that the ore in question was "mined and extracted long prior to any alleged forfeiture of the contract" is entirely immaterial, in view that the ore was removed from a place where appellant never had any right to take ore.

The next, and only other, contention, in view of the foregoing, is also immaterial.

The petition should therefore be denied. Such is the order.

STRAUP, C. J., and McCARTY, J., concur.

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27. **REVIEW—QUESTIONS OF FACT—FINDING.** In equity cases the findings of the trial court prevail unless it clearly appears from the record that they are against the weight of the evidence. *Mayer v. Flynn*, 598.
28. **FINDINGS OF FACTS—REVIEW.** Under the Constitution, the parties to every appeal in equity can invoke the judgment of the Supreme Court on the facts, as well as on the law, so that, where the findings relating to boundaries were not clearly against the evidence the Supreme Court must pass upon the evidence and determine the ultimate facts. *Mayer v. Flynn*, 598.
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30. **FINDINGS—SUPPORT IN EVIDENCE—REVIEW.** All parties are entitled to invoke the Supreme Court's judgment on the facts in equity cases, and where the findings are clearly against the evidence, or the court is satisfied that the presumption of their correctness has been overcome by the record, it must make or direct findings according to the evidence and the law applicable thereto. *Little v. Stringfellow*, 576.

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2. **BONA FIDE HOLDER—BURDEN OF PROOF.** On proof of defective title of the indorser of a note, the indorsee suing thereon must show, under Comp. Laws 1907, Sections 1604, 1611, that he acquired title in due course. *Miller v. Marks*, 257.
3. **BONA FIDE HOLDER—NOTICE OF INFIRMITY IN NOTE—EVIDENCE.** That an indorsee of a note for \$2,500 paid only \$2,100 or \$2,300 therefor does not raise a presumption of knowledge on his part of some infirmity in the note. *Miller v. Marks*, 257.
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5. **BONA FIDE PURCHASER—PAYMENT.** To constitute payment to protect purchaser of a negotiable instrument, the consideration may consist of anything constituting a valid consideration of sufficient value. *Miller v. Marks*, 257.

6. **SAME—SAME.** Where negotiable checks are exchanged for a negotiable note, each is an independent obligation and a sufficient consideration for the other. *Miller v. Marks*, 257.

**BONDS.** See "PRINCIPAL AND AGENT."

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#### COMMON LAW. HUSBAND AND WIFE.

PROPERTY OF WIFE—ADOPTION BY TERRITORY—STATUTE. The Organic Act of 1850 put in force the common law and system of equity generally prevailing in the country. *Hatch v. Hatch*, 116.

#### CONSTITUTIONAL LAW. See "LICENSES," "STATUTES."

1. **PERSONAL RIGHTS—RIGHT TO ACQUIRE AND DISPOSE OF PROPERTY.** Laws 1915, c. 23, Sections 1-3, fixing 6 p. m. as the closing hour for mercantile and commercial houses in cities of 10,000 or more, and exempting drug stores and provision houses, *held* to violate the constitutional right to enjoy, acquire, and possess property. *Saville v. Corless*, 495.
2. **PROTECTION OF PROPERTY—POLICE POWER.** All constitutional provisions respecting the rights of acquiring, possessing, and protecting property must be construed in view of the police power of the state, unless the Constitution expressly provides otherwise. *State v. Briggs*, 288.
3. **INTOXICATING LIQUORS—LOCAL OPTION—CONSTITUTIONALITY.** The local option statute is not unconstitutional as a delegation by the state of its police power to municipalities. *State v. Briggs*, 288.

4. DELEGATION OF POWER—LOCAL OPTION LAW. Laws 1911, c. 106, the local option statute is not unconstitutional as a delegation of legislative powers to the voters of the various local option units. *State v. Briggs*, 288.
5. HIGHWAYS—POLL TAX—VALIDITY OF STATUTE—EQUAL RIGHTS AND PRIVILEGES. Laws 1909, c. 118, Section 6, imposing an annual road poll tax on men alone, *held* not violative of Const. art. 4, section 1. *Salt Lake City v. Wilson*, 60.
6. PROVINCE OF COURTS—INJUSTICE OF STATUTE. That a statute prescribing a road poll tax may be unjust does not authorize the courts to declare it invalid. *Salt Lake City v. Wilson*, 60.

## CONTRACTS.

"MENTAL CAPACITY"—STATUTE. Comp. Laws 1907, sec. 4001, *held* not to alter ordinary test of contractual incapacity, which is the impairment of a person's mental faculties so that he cannot understand the subject, nature, or probable consequences of his engagement. *Hatch v. Hatch*, 218.

## CORPORATIONS.

1. STOCK PURCHASE—RESCISSION—COMPLAINT—SUFFICIENCY. A complaint *held* to state a cause of action for rescission of purchase based on deceit in sale of corporate stock. *Hancock v. Luke*, 26.
2. STOCK SUBSCRIPTION—RESCISSION. To rescind a stock subscription, plaintiff must show that defendant has made a knowingly false representation as to a material fact, with intent that it should be acted upon and that it was acted upon by plaintiff, to his damage, while ignorant of its falsity. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 1.
3. SAME—REPRESENTATIONS. False statements by corporation officers to induce stock subscriptions, guaranteeing profits and stating that dividends already paid had been earned, *held* to warrant a rescission. *Id.*, 1.
4. SAME—SAME. False statements by corporation officers to induce subscriptions to stock, that the company had assets to pay dividends for a certain time, *held* ground for rescission, although unearned dividends were in fact paid. *Id.*, 1.

## COSTS.

APPEAL FOR DELAY—PENALTY. In view of constitutional right of appeal and statutory right of superseding judgment, *held* that defendant, who had taken an appeal within the time allowed and given a supersedeas bond, would not be penalized on the ground that the appeal was merely for delay. *Brophy v. Ogden Rapid Transit Co.*, 426.

## COURTS.

1. RULES OF DECISION—PREVIOUS DECISION OF SAME COURT. A decision affirming a judgment is of no controlling force in a subsequent case as to any question involved but not argued or presented, and left unnoticed or not passed on by the court. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.



2. **SAME—DECISION OF UNITED STATES COURTS—FEDERAL QUESTION.** In the construction of acts of Congress relating to public lands, involving a federal question, the holding of the Supreme Court of the United States should be followed by the state court. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.

#### CRIMINAL LAW.

1. **EVIDENCE—TRANSCRIPT ON PRELIMINARY EXAMINATION—STATUTE.** Under Comp. Laws 1907, 4670, 4685x1, transcript of testimony on preliminary examination for homicide, transcribed by stenographer in typewriting, testified by stenographer at trial to be correct, was not inadmissible because certificate stated transcript was in long-hand, when it was typewritten. *State v. Hillstrom*, 341.
2. **TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.** A charge that the jury might disregard the testimony of any witness whom they believed willfully testified falsely to material facts, unless such witness was corroborated by credible witnesses or evidence, held proper. *State v. Hillstrom*, 341.
3. **SAME—SAME—INSTRUCTIONS SUBSTANTIALLY GIVEN.** The refusal of requested charges substantially given is not erroneous. *State v. Hillstrom*, 341.
4. **INVITED ERROR—REQUESTED CHARGE.** Where claimed objectionable language in an instruction was taken from one of defendant's requests, he could not complain. *State v. Hillstrom*, 341.
5. **TRIAL—INSTRUCTIONS—CIRCUMSTANCES OF SUSPICION.** An instruction that suspicious circumstances, amounting to no more than suspicion, are not sufficient proof of guilt, held not erroneous as telling the jury that such circumstances are evidence. *State v. Hillstrom*, 341.
6. **TRIAL—INFERENCES FROM EVIDENCE—FUNCTION OF JURY.** The drawing of inferences from facts in evidence is for the jury. *State v. Hillstrom*, 341.
7. **APPEAL—QUESTIONS REVIEWABLE—CREDIBILITY OF WITNESSES.** The credibility and weight of the testimony of a witness was for the jury, not for the appellate court. *State v. Hillstrom*, 341.
8. **EVIDENCE—ADMISSION—SILENCE OF DEFENDANT.** Silence of one in custody for murder, when questioned by officer as to the quarrel he claimed to have received a wound through the body, could not be considered an admission of guilt. *State v. Hillstrom*, 341.
9. **SAME—PRIVILEGE OF ONE ACCUSED OF CRIME.** While unfavorable inferences may not be drawn against a defendant by his failure to testify, he cannot avoid reasonable inferences from proven facts within his knowledge by merely refusing to take the stand. *State v. Hillstrom*, 341.
10. **TRIAL—REQUISITE PROOF OF GUILT.** The state must prove the defendant guilty beyond a reasonable doubt. *State v. Hillstrom*, 341.
11. **EVIDENCE—TESTIMONY ON PRELIMINARY EXAMINATION—STATUTES.** Under Comp. Laws 1907, Sections 4670, 4685x1, transcript

of testimony of physician on preliminary examination for homicide held admissible in evidence at trial, the witness being out of the state and due diligence to subpoena him having been shown. *State v. Hillstrom*, 341.

12. **SAME—SAME—STATUTE.** Under Comp. Laws 1907, sections 4670, 4685x1, transcript of testimony of medical witness, out of state at the time of trial, taken on preliminary examination for homicide, stating the defendant was present and had opportunity to cross-examine, held not inadmissible as denying the latter such opportunity in the presence of the trial jury. *State v. Hillstrom*, 341.
13. **TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTED CHARGE.** Where the jury is charged fully and accurately, no error can be predicated upon any refusal to give any requested instruction. *State v. Benson*, 74.
14. **DEMONSTRATIVE EVIDENCE—CLOTHING.** In prosecution for assault with intent to have carnal knowledge, skirt worn by prosecutrix, although washed and worn subsequently, held properly admitted to show extent of a tear as indicative of violence. *State v. Benson*, 74.
15. **PROVINCE OF JURY—WEIGHT OF EVIDENCE.** The weight of evidence and credibility of the witnesses are for the jury. *State v. Benson*, 74.
16. **EVIDENCE—MAP OF LOCALITY OF CRIME—TAKING TO JURY ROOM.** Use, by jury during deliberations, of map not formally introduced in evidence, making plainer testimony as to the movements of defendant and prosecutrix on the night of the crime, held not to affect fairness of trial. *State v. Benson*, 74.
17. **WITNESSES—COMPETENCY OF CHILD.** The competency of a child to testify being within the discretion of the trial court, its decision will not be disturbed unless clearly abused. *State v. MacMillan*, 19.
18. **INSTRUCTIONS—REQUESTS—NECESSITY.** Failure of the court to charge on the subject of good character of accused proved by undisputed testimony, was not error, in the absence of a request therefor. *State v. MacMillan*, 19.
19. **CONTINUANCE—RIGHT.** Where accused's showing was controverted, the denial of a continuance, sought on the ground of excitement and bias of inhabitants, cannot be reviewed. *State v. Anselmo*, 137.
20. **LEGALITY OF ARREST—QUESTION OF LAW.** It is a question of law whether an arrest was lawful, even if the facts are in dispute, in which case the court must charge the jury that under specific facts the arrest was lawful or unlawful. *State v. Anselmo*, 137.
21. **LAWFUL ARREST—PRESUMPTION.** In a prosecution for killing an officer, who was attempting to arrest him, held, that it could not be inferred, in support of the legality of the arrest, that accused had committed a felony or then was committing a misdemeanor. *State v. Anselmo*, 137.
22. **EVIDENCE OF GOOD CHARACTER—REBUTTAL.** Evidence that accused had possession of property which might be used for

criminal purposes held inadmissible to rebut his evidence of good character. *State v. Anselmo*, 137.

23. INSTRUCTIONS—ABSTRACT INSTRUCTION. The court should as much as possible avoid abstract instructions, simply directing the jury in plain terms what the result should be in case they found the facts on any issue as indicated by court. *State v. Anselmo*, 137.

#### DAMAGES.

1. PLEADING AND PROOF—EXPENSE—PHYSICIAN'S SERVICES. Under the allegation of complaint in an action for personal injury, proof that \$250 was a reasonable value for the services of the doctor who attended plaintiff held receivable. *Candland v. Mellen*, 519.
2. INSTRUCTIONS—CONFORMITY TO EVIDENCE. In an action for personal injury, where there was proof of injury to plaintiff's leg, but no proof that other diseases were traceable to such injury, charge not excluding damages for such other diseases was erroneous. *Candland v. Mellen*, 519.
3. SAME—SAME. In an action for personal injury, charge as to damages held erroneous as beyond the issues made by the evidence. *Candland v. Mellen*, 519.

#### DEATH.

1. ACTION FOR—DAMAGES—EXCESSIVE DAMAGES. A verdict of \$5,300 for death held not excessive, under Comp. Laws of 1907, sec. 2912. *Brostrom v. Lynch-Cannon Engineering Co.*, 103.
2. PERSON ON TRACK—PRESUMPTIONS—CARE. It will be presumed that deceased, who was run down by defendant's cars, was in the exercise of due care. *Ryan v. Union Pac. R. Co.*, 530.
3. EVIDENCE—INJURIES—PRESUMPTIONS—EFFECT. Where the facts surrounding the running down of plaintiff's intestate appeared the presumption of due care from the instinct of self-preservation cannot be considered. *Ryan v. Union Pac. R. Co.*, 530.

#### DEEDS.

1. CONVEYANCE BY FATHER TO SON—UNDUE INFLUENCE—PRESUMPTION. The fact of a father's voluntary conveyance to his son at the instigation of the mother, gave rise to no presumption of undue influence to throw upon grantee the burden of proving good faith. *Hatch v. Hatch*, 218.
2. DEED TO SON—SAME—SUFFICIENCY OF EVIDENCE. In an action to cancel a conveyance from father to son, made at the instigation of the mother, evidence held insufficient to show her undue influence. *Hatch v. Hatch*, 218.
3. INCAPACITY OF GRANTOR—SUFFICIENCY OF EVIDENCE. Evidence held insufficient to authorize finding of lack of capacity of the grantor. *Hatch v. Hatch*, 218.
4. DELIVERY—PRESUMPTION. Where a deed was recorded, the grantee going into and remaining in possession, and the grantor survived the making of such deed for about 3½ years without questioning its validity or delivery, a presumption of delivery arose. *Hatch v. Hatch*, 218.

5. **VALIDITY—UNDUE INFLUENCE—EVIDENCE.** In an action to cancel a deed for undue influence, two previous deeds by the same grantor, one of which was to another grantee, *held* admissible in evidence to show reason for the conveyance in question. *Hatch v. Hatch*, 218.

#### DISMISSAL AND NONSUIT.

**FAILURE TO PROSECUTE.** Where defendants, who had the same right as the plaintiff to press the action to trial, permitted it to remain pending for about three years, their motion to dismiss for failure to prosecute was properly denied. *Wright v. Howe*, 588.

#### DRAINS.

**DRAINAGE DISTRICTS—ISSUANCE OF BONDS—SUBMISSION TO POPULAR VOTE—NOTICE.** Laws 1913, c. 95, sec. 32, as to special drainage district elections, *held* meaningless as to notice of election, and an election thereunder was invalid. *Moody v. Millard County Drainage Dist. No. 1*, 24.

#### EMINENT DOMAIN.

1. **ACTION FOR COMPENSATION—WAIVER OF TORTS.** Under constitutional and statutory provisions requiring compensation to be first made for private property taken for public use, owner of land so taken may waive the tort and sue for his just compensation. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.
2. **CONDEMNATION—DAMAGES.** Notwithstanding Comp. Laws 1907, sec. 3598, general benefits for the establishment of a railroad cannot be deducted from the damages to owners whose land was taken for a right of way. *Salt Lake & U. R. Co. v. Butterfield*, 431.
3. **REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.** In an action to condemn land for a railroad right of way exclusion of evidence as to relation of defendants' witness to defendants in another action *held* not prejudicial to plaintiff. *Salt Lake & U. R. Co. v. Abbott*, 500.

#### ESTOPPEL.

**EQUITABLE ESTOPPEL.** Plaintiff *held* not estopped to claim land which defendant, an adjoining proprietor, had inclosed. *Moyle v. Thomas*, 542.

**EVIDENCE.** See "CRIMINAL LAW," "LICENSES," "PARTNERSHIP," "SPECIFIC PERFORMANCE," "WITNESSES."

1. **OPINION EVIDENCE—EXPERT TESTIMONY.** Where a witness was qualified to give opinion evidence, the fact his qualifications were shown in an informal manner will not render the admission of his testimony erroneous. *Salt Lake & U. R. Co. v. Butterfield*, 431.
2. **OPINION EVIDENCE—MARKET VALUE.** The rule governing the competency of opinions is not so strictly applied to questions of value as to many other subjects, especially where the jury are given the facts upon which the opinions are based. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.

3. SAME—QUALIFICATION, MARKET VALUE. In action to recover compensation for taking of land upon which there was a hot spring, witness for plaintiff *held* qualified to express opinion as to its market value. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.
4. SAME—VALUE. The rule governing the competency of opinions is not so strictly applied to questions of value as to many other subjects, especially where the jury are given the facts upon which the opinions are based. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.
5. OPINION—CONCLUSIONS OR FACTS. An answer that it was the duty of employees to examine the place of work in response to a question as to what was the custom *held* not to state a conclusion. *Requa v. Daly-Judge Mining Co.*, 92.

#### EXCEPTIONS, BILL OF.

1. EXTENSION OF TIME FOR SETTling—NECESSITY OF SHOWING EXTENSION IN BILL. Under Comp. Laws 1907, sec. 3197, as amended by Laws 1911, c. 94, bill of exceptions *held* to be disregarded where orders extending time for serving and settling it were not incorporated in the bill. *Dayton v. Free*, 277.
2. TIME FOR FILING—EXTENSIONS OF TIME. Where judgment against defendant became final May 9th, order of May 27th granting defendant sixty days to serve and file a bill of exceptions meant sixty days from that date, so that order of July 17th extending time was made before the expiration of the time first granted. *Candland v. Mellen*, 519.
3. TIME FOR SERVICE—SUSPENSION. On the death of the plaintiff after judgment in her favor, either the time in which the defendant is required to serve a bill of exceptions was suspended until the appointment of an administrator, or the court, on defendant's application, had the power to extend the time until there was an administrator. *Candland v. Mellen*, 519.

#### EXCHANGE OF PROPERTY.

PERSONAL PROPERTY—CONTRACT. Where plaintiff, in making a trade of horses, dealt with the several owners as individuals, they cannot escape liability for boot money on the ground that his first proposal was that, if all the parties interested in the horse would not agree to the sale, it should not be consummated. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.

#### EXECUTORS AND ADMINISTRATORS.

1. CLAIMS—PRESENTMENT—STATUTE. Suit by administrator of wife against executors of husband *held* not barred, through causes of action in the complaint not conforming to claims presented to and rejected by the defendants. *Hatch v. Hatch*, 116.
2. ADMINISTRATOR'S SALE—PURCHASER. An administrator's sale is subject to the rule of *caveat emptor*, and a purchaser cannot complain if his holding from an uncertain boundary is less than the description, nor can those claiming under a decree of distribution who received all their land object that the purchaser acquired more than his deed called for. *Moyle v. Thomas*, 542.

3. CONVEYANCE OF TESTATOR—UNDUE INFLUENCE—DUTY OF EXECUTOR. It is the duty of an executor to bring suit to cancel his testator's conveyances thought to have been procured by undue influence. *Hatch v. Hatch*, 218.

#### FISH.

GAME—PRIVATE RIGHTS. Though defendants were entitled to fish in a river, that right does not entitle them to fish on the water submerging plaintiff's land. *Knudson et al. v. Hull et al.*, 114.

FORFEITURE. See "INSURANCE."

#### FRAUD.

STOCK SUBSCRIPTION—REPRESENTATIONS. Statements by corporation officers to purchasers of stock that they would get handsome returns, that the stock would double in value, and that they would not lose, are not actionable, *per se*, although not true. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 1.

#### FRAUDS, STATUTE OF.

1. CONTRACTS. A memorandum, reciting receipt of thirty dollars as part payment for thirty acres of land, is insufficient to take the case without the statute of frauds, not describing the land. *Adams v. Manning*, 82.
2. PART PERFORMANCE. Where one owning considerable land contracted to sell an undescribed thirty acres, and the purchaser having paid part of the price mended fences on one parcel and grazed stock thereon, there was no part performance taking the case out of the statute of frauds. *Adams v. Manning*, 82.
3. POSSESSION. Where a contract for the sale of thirty acres of land did not designate the property, and the grantor owned considerable land, mere possession of a particular parcel by letting stock graze thereon will not take the case out of the statute of frauds. *Adams v. Manning*, 82.

#### HIGHWAYS.

1. REGULATION—SPEED OF AUTOMOBILE. Although Laws 1909, c. 113 (Laws 1911, c. 131), allows automobiles to be operated on country roads at twenty miles an hour, operating them at a less speed, under some given circumstances, may be negligence. *Fowkes v. J. I. Case Threshing Machine Co.*, 502.
2. ACTION FOR INJURIES—EVIDENCE—SPEED OF AUTOMOBILE. In an action for injuries due to a runaway of plaintiff's horses in being struck by defendant's automobile, evidence held not to support a finding that the automobile was operated at a negligent speed. *Fowkes v. J. I. Case Threshing Machine Co.*, 502.
3. SAME—SUFFICIENCY. Evidence held insufficient to support a finding that plaintiff's horse was struck by the automobile. *Fowkes v. J. I. Case Threshing Machine Co.*, 502.
4. SAME—WARNING. Evidence held sufficient to show that defendant failed to sound the horn of the automobile, as required by statute. *Fowkes v. J. I. Case Threshing Machine Co.*, 502.

5. SAME—LAW OF ROAD. Evidence *held* sufficient to sustain a finding that the automobile passed plaintiff on the wrong side. *Fowkes v. J. I. Case Threshing Machine Co.*, 502.
6. POLE TAX—POWER TO IMPOSE. The imposition of a road poll tax is within the police powers of a state, but the state is limited within reasonable bounds in the application and enforcement of this power. *Salt Lake City v. Wilson*, 60.

#### HOMICIDE.

1. MOTIVE—EVIDENCE. Property which might be used for an unlawful purpose, and was found in-accused's room, *held* inadmissible in evidence on the question of motive. *State v. Anselmo*, 137.
2. DEFENSES—MENTAL CONDITION. The mental condition of defendant may be considered on questions of deliberation and premeditation, though his incapacity was not such as to relieve him of responsibility. *State v. Anselmo*, 137.
3. MURDER IN THE FIRST DEGREE—DEFENSES. That he was illegally arrested will not warrant accused in taking the life of the arresting officer, unless he was in danger of life or limb. *State v. Anselmo*, 137.
4. TRIAL—INSTRUCTIONS. Under Comp. Laws 1907, sec. 4161, it is improper to charge the jury that premeditated means thought of beforehand, for any length of time, however short, and that there need be no appreciable space of time between the intention to kill and the act. *State v. Anselmo*, 137.
5. APPEAL—HARMLESS ERROR. A misleading instruction on premeditation *held* prejudicial error. *State v. Anselmo*, 137.
6. INSTRUCTIONS—ABSTRACT INSTRUCTIONS. An instruction on intoxication in the words of Comp. Laws 1907, sec. 4070, *held* insufficient in a prosecution for homicide against an epileptic who was under the influence of liquor at the time of the killing. *State v. Anselmo*, 137.
7. TRIAL—IDENTITY—SUFFICIENCY OF EVIDENCE. In a prosecution for first degree murder, evidence as to the identity of defendant with the victim's assailant *held* sufficient to sustain verdict of guilty. *State v. Hillstrom*, 341.
8. HARMLESS ERROR—RECEPTION OF INADMISSIBLE TESTIMONY. In a prosecution for murder, where there was no dispute but that the deceased were killed with a 38 caliber automatic pistol, the admission of testimony of a medical witness not qualified on the subject that, in his opinion, a wound was caused by a 38 caliber bullet, was harmless. *State v. Hillstrom*, 341.

#### HUSBAND AND WIFE. See "LIMITATION OF ACTIONS."

PROPERTY OF WIFE—RECOVERY—LACHES OF WIFE. In action by administrator of wife against executors of husband to recover her separate property, mere lapse of time short of statute of limitations *held* no ground of demurrer to complaint as for laches. *Hatch v. Hatch*, 116.

## IMPROVEMENTS.

COMPENSATION—STATUTORY PROVISIONS. Under Comp. Laws 1907, secs. 2021, 2022, an occupying claimant, adjudged not to be the owner, *held* entitled, after an adverse decision on appeal, to file a petition in the trial court to determine value of improvements made by him. *Fares v. Urban*, 609.

## INDICTMENT AND INFORMATION.

STATUTORY OFFENSE—INDICTMENT IN LANGUAGE OF STATUTE. An indictment in the language of the statute, Session Laws 1909, c. 26, *held* sufficient. *State v. MacMillan*, 19.

## INJUNCTION.

CONTEMPT—DISOBEDIENCE OF DECREE. Under Comp. Laws Utah, 1907, sec. 1288x25, as amended by Laws 1911, c. 43, defendant, who in good faith had turned water into a stream and diverted it at a different point, was not guilty of contempt in disobeying a former decree adjudicating water rights in the stream. *Spanish Fork City v. Spanish Fork East Bench Irr. & Min. Co.*, 487.

## INSTRUCTIONS. See "TRIAL."

## INSURANCE.

1. ACTION ON BENEFIT CERTIFICATE—EVIDENCE. A document purporting to be proofs of death, submitted to the insurer on behalf of insured's father by the local council, *held* properly excluded. *Moran v. Knights of Columbus*, 397.
2. ACTION ON CERTIFICATE—QUESTION FOR JURY—MENTAL CONDITION OF INSURED. Issues as to insured's suicide and as to his mental condition at the time *held* properly submitted to the jury. *Moran v. Knights of Columbus*, 397.
3. FORFEITURE—NONPAYMENT OF PREMIUMS—ENFORCEMENT. A provision of the by-laws of a fraternal benefit association, declaring a forfeiture *ipso facto* for nonpayment of assessments, *held* not enforceable as against a member whose assessments had been paid, although not regularly shown on the association's books. *Moran v. Knights of Columbus*, 397.
4. ACTION ON CERTIFICATE—PLEADINGS—PARTIES. In an action by plaintiff as the widow of an insured, *held*, on the pleadings, that the question whether plaintiff was the real party in interest was not properly raised. *Moran v. Knights of Columbus*, 397.
5. SAME—REPLY—STATUTE. Under Comp. Laws 1907, sec. 2980, as amended by Laws 1907, c. 39, plaintiff in an action to recover on a benefit certificate, defended on the ground of insured's suicide, *held* not required to reply in order to make her evidence as to insured's mental condition admissible. *Moran v. Knights of Columbus*, 397.
6. PROOFS OF DEATH—WAIVER. An insurer who unconditionally denies all liability on a policy sued on waives a condition in the policy requiring proofs of death. *Moran v. Knights of Columbus*, 397.
7. CONSTRUCTION AGAINST FORFEITURE. Equity and good conscience abhor forfeitures, and insurance contracts will be construed



to avoid them if possible; which rule is the same at law and in equity, in view of Comp. Laws 1907, sec. 2489. *Moran v. Knights of Columbus*, 397.

8. **FORFEITURE—WAIVER.** Where a forfeiture is insisted upon, insurer must inform itself as to its rights in that regard within at least some reasonable time, or to be deemed to have waived its right to a forfeiture. *Moran v. Knights of Columbus*, 397.

#### INTOXICATING LIQUORS. See "STATUTES."

**PROHIBITION—CONSTITUTIONALITY.** The state has the right, under its police power, absolutely to prohibit the sale of intoxicating liquors. *State v. Briggs*, 288.

#### JOINT-STOCK COMPANIES. See "PARTNERSHIP," "TENANCY IN COMMON."

1. **PARTNERSHIP—TENANCY IN COMMON—WHAT CONSTITUTES.** Where a number of individuals purchased a horse, each owning a share in the animal according to the amount he paid, the owners did not constitute a joint-stock company. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.
2. **WHAT ARE.** A joint-stock company is generally classified as a partnership, possessing some of the characteristics of a corporation; its members being liable ordinarily as partners. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.
3. **ACTIONS AGAINST—INSTRUCTIONS—SURRENDER OF ISSUES.** Where defendants in their answer characterized themselves as a joint-stock company, and there was evidence that some of the defendants effected individual settlement of the claim, the court should submit to the jury whether such settlement discharged the joint obligation. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.

#### JURY.

**TRIAL—EXAMINATION OF VENIREMEN.** In a prosecution for homicide, the sustaining of objections to questions to veniremen held not erroneous; he having already been examined on such matters. *State v. Hillstrom*, 341.

#### JUSTICES OF THE PEACE. See "STATUTES," "CONSTITUTIONAL LAW."

**STATUTE FIXING SALARIES—CONSTITUTIONALITY.** Laws 1915, c. 108, amending Comp. Laws 1907, sec. 544, fixing the salaries of justices of the peace in precincts coextensive with cities of the first class, is not violative of Const. art. 21, secs. 1, 2, providing that, except justices, state, etc., officers shall be paid salaries. *Martineau v. Crabbe*, 327.

#### LICENSES.

1. **CONSTITUTIONALITY OF ORDINANCE—UNIFORMITY.** A city ordinance, requiring license fees in different amounts for peddling or soliciting foods, provisions, or ordinary articles for household use, held discriminatory within Comp. Laws 1907, sec. 206, subd. 87. *Park City v. Daniels*, 554.
2. **SAME—SAME.** A city ordinance, imposing a license fee for peddling provisions, articles of general merchandise, and articles

for household use, *held* invalid under Comp. Laws 1907, sec. 206, subd. 87, as discriminating in favor of local merchants. *Park City v. Daniels*, 554.

3. SAME—SAME. While city authorities may impose license and occupation taxes and make reasonable classifications for such purpose, such fees and taxes must, under the express terms of Comp. Laws 1907, sec. 206 subd. 87, be uniform in respect to the class upon which they are imposed. *Park City v. Daniels*, 554.
4. SAME—SAME—UNCERTAINTY OF TERMS. A city ordinance, requiring a \$100 license fee for peddling "wares and merchandise of a general character" and a fee of \$7 for peddling "small articles for household use," *held* discriminatory because of uncertainty of terms. *Park City v. Daniels*, 554.

#### LIMITATION OF ACTIONS.

1. PROPERTY OF WIFE—RECOVERY—PLEADING. In action by administrator of wife to recover her separate estate against executors of husband, complaint showing lapse of time in excess of limitations *held* not demurrable therefor, where it alleged holding by husband in relations of trust, and did not allege any repudiation or adverse holding. *Hatch v. Hatch*, 116.
2. SUSPENSION OF STATUTE—DEATH AND ADMINISTRATION—EFFECT. Limitations against cause of action, arising after intestate's death, do not begin to run until administrator is appointed. *Hatch v. Hatch*, 116.
3. TAKING PROPERTY—ACTION FOR COMPENSATION. Action for compensation for taking land for public use by defendant railroad *held* not governed by Comp. Laws 1907, sec. 2877, subdiv. 2, or sec. 2883, but by sec. 2860, requiring actions founded on realty to be commenced within seven years. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.

#### LOST INSTRUMENTS.

DEEDS—RESTORATION—SUFFICIENCY OF EVIDENCE. Evidence, in an action to restore a lost deed brought against the administrator of one of the alleged grantors, *held* to require a decree restoring the deed. *Little v. Stringfellow*, 576.

#### MANDAMUS.

ENFORCEMENT OF SPECIAL ASSESSMENT—STATUTES. Comp. Laws 1907, secs. 258, 282x6, 282x8, and an ordinance of Salt Lake City, *held* not to impose upon the city treasurer the duty to sell property assessed for street paving purposes upon delinquency of an instalment only of the tax before the whole tax was due and delinquent with sufficient certainty to justify the direction of such action by mandamus. *Stinson v. Godde*, 468.

#### MASTER AND SERVANT.

1. LIABILITY FOR INJURIES—NEGLIGENCE OF "INDEPENDENT CONTRACTORS." Under contract to construct tunnel for mining company, contractors *held* "independent contractors" for whose negligence in failing to warn the servant the company was not liable to an employee. *Dayton v. Free*, 277.

2. SAME—SAME. Injury to employee of independent contractors constructing mining tunnel, by the discharge of a "missed hole," due to failure to warn the servant, *held* not one for which the contractor's employer was liable. *Dayton v. Free*, 277.
3. INJURIES TO SERVANT—NEGLIGENCE OF MASTER. That a master did not tie a roll of blankets on a wagon does not show him negligent, for he could not assume that the blankets which slipped down upon plaintiff would knock him from the seat. *Smith v. Phoenix Const. Co.*, 528.
4. STATUTORY REGULATIONS—HOURS OF WORK AND CLOSING. Laws 1915, c. 23, fixing six p. m. as the closing hour for mercantile and commercial houses, *held* not a valid exercise of the police power, not being directed against enterprises, health, morals, or welfare. *Saville v. Corless*, 528.
5. INJURIES TO SERVANT—NEGLIGENCE. In personal injury action by servant, question of master's negligence *held* for jury. *Hunt v. Moran*, 388.
6. SAME—CONTRIBUTORY NEGLIGENCE. The question of a servant's contributory negligence *held* for the jury. *Hunt v. Moran*, 388.
7. SAME—ASSUMPTION OF RISK. A minor servant who was in charge of a derrick *held* not, as a matter of law, to have assumed risk of injury from a defective dog which the master had the day before placed on the derrick. *Hunt v. Moran*, 388.
8. DEATH OF SERVANT—NEGLIGENCE—INFERENCES. Where an inference of an employer's negligence arises, the inference may be strengthened by his failure to explain the accident. *Brostrom v. Lynch-Cannon Engineering Co.*, 103.
9. MISLEADING INSTRUCTIONS. In an action for negligent death of an employee, an instruction *held* not misleading. *Brostrom v. Lynch-Cannon Engineering Co.*, 103.
10. DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE. An employee going on a scaffold prepared for that purpose is not guilty of contributory negligence. *Brostrom v. Lynch-Cannon Engineering Co.*, 103.
11. INJURY TO THIRD PERSON—USE OF HIGHWAY—AGENCY OF DRIVER—BURDEN OF PROOF. To establish a *prima facie* case, the burden of proof was on plaintiff street sweeper, injured by delivery wagon of defendant, affirmatively shown to have been driven by third person, to produce some evidence that driver was defendant's servant, acting in course of his employment. *Ferguson v. Winter*, 321.

#### MINES AND MINERALS.

1. MINING CONTRACTS—CONSTRUCTION. Where a contract required defendant to have employed in the construction of a tunnel at least four men per day working twenty days per month, defendant was not entitled to work a less number of men a greater number of days and hours per month. *Arkoosh v. Sorenson*, 625.
2. CONTRACTS—RIGHT TO MINERAL. Under a mining contract, plaintiffs *held* entitled to ore taken from the mine by defendant. *Arkoosh v. Sorenson*, 625.

## MUNICIPAL CORPORATIONS.

1. COLLISION WITH WAGON—OWNERSHIP—QUESTION FOR JURY. In an action for injuries to plaintiff street sweeper by a delivery wagon, question of the ownership of such wagon held for the jury under the evidence. *Ferguson v. Winter*, 321.
2. EXCAVATION IN STREET—INJURY TO PEDESTRIAN—ACTION FOR INJURY. On the evidence in an action for personal injury alleging defendant's negligence in leaving an excavation unguarded and unlighted, whereby plaintiff stepped into it, held, that whether plaintiff stepped into an excavation at the place alleged in the complaint, the existence and the character of the excavation, and plaintiff's contributory negligence, were for the jury. *Candland v. Mellen*, 519.
3. SAME—SAME—CONTRIBUTORY NEGLIGENCE—PRESUMPTION. It could not be conclusively inferred, from the fact that plaintiff resided near by, that she had full knowledge of the extent and character of street excavation into which she fell. *Candland v. Mellen*, 519.
4. PUBLIC IMPROVEMENTS—NOTICE OF MANDAMUS. Under Comp. Laws 1907, sec. 273, notice of intention to levy special taxes for improvements held jurisdictional, so that plaintiffs' property, not included therein, could not thereafter be legally assessed without a new notice of intention duly published. *Jones v. Foulger*, 419.
5. STREETS—GRANT OF RIGHTS TO USE TO STREET RAILROAD. Where a spur track was necessary to enable an electric railway which was a common carrier to reach its car barns, the city council may authorize the laying of the tracks in the street, though it could not allow the building of tracks for a more private use. *Whitmeyer v. Salt Lake & O. Ry. Co.*, 491.
6. TORTS—DEFECTS IN STREETS. Where a city, in paving and guttering streets, and constructing sidewalks and crosswalks, adopted and followed a plan prepared by a competent civil engineer, it was not liable for injuries to a pedestrian who stepped into a gutter filled with water from rain, receiving a fall thereby. *Ward v. Salt Lake City*, 616.
7. SAME—INJURIES TO PEDESTRIAN FROM GUTTER—PROXIMATE CAUSE. Where a pedestrian in crossing a street deflected from the straight course so as to step into the uncovered part of the gutter, which was overflowing with rain, so as to conceal that such part was uncovered, the pedestrian's turning aside, not the overflowing, was the proximate cause of the accident. *Ward v. Salt Lake City*, 616.

## NEGLIGENCE.

1. LIABILITY OF SELLER OF GOODS. Defendants, who on request for raw linseed oil for veterinary uses delivered boiled linseed oil, which resulted in the death and injury of plaintiff's horses, held liable in damages. *Wright v. Howe*, 588.
2. SAME—CONTRIBUTORY NEGLIGENCE. In an action to recover for death of and injury to plaintiffs' horses from administering boiled linseed oil sold by defendants, instead of raw linseed oil, as called for, held that plaintiff was not negligent in not inspecting the oil before administering it. *Wright v. Howe*, 588.

3. **PROXIMATE CAUSE.** The negligence of either party is operative only when it is the proximate cause of the injury or damage complained of. *Gibson v. Utah Light & Traction Co.*, 562.
4. **PLEADING.** Under the code system a pleader may allege in one statement as many acts of negligence relating to one transaction as he may rely on, and on trial need only prove one of the acts if it is sufficient to entitle him to recover. *Ward v. Salt Lake City*, 616.

#### PARTNERSHIP.

1. **POWERS OF PARTNERS—TENANTS IN COMMON.** Every partner has authority to bind all other partners by his acts in relation to the business of the firm as if he held full power of attorney from all members. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.
2. **LIABILITY OF PARTNERS.** A subsequent agreement between part of the owners of a horse and one with whom they were to make an exchange held to free the other owners from liability, though they be considered partners. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.
3. **EVIDENCE TO ESTABLISH.** Where a number of individuals purchased a horse, each owning a share in the animal according to the amount he paid, the owners did not constitute a partnership. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.

**PERSONAL INJURY.** See "STREET RAILROADS."

#### PLEADING.

1. **CONSTRUCTION.** Under Comp. Laws 1907, sec. 2986, declaring that a pleading should be liberally construed with a view to substantial justice, the mere form of a denial of particular allegations of a complaint is not conclusive. *Hancock v. Luke*, 26.
2. **MOTION FOR JUDGMENT ON.** Plaintiff's motion for judgment on pleadings is, in legal effect, a general demurrer to the answer, and hence searches the entire record, including the complaint. *Hancock v. Luke*, 26.
3. **SAME.** The courts possess the inherent power, independently of statute, to direct judgment on the pleadings in case a cause of action is not set forth in the complaint or no legal defense is presented in the answer. *Hancock v. Luke*, 26.
4. **SAME—DENIAL.** Plaintiff's motion for judgment on the pleadings should be denied, where the answer is not clearly defective. *Hancock v. Luke*, 26.
5. **AMENDMENT—ALLOWANCE.** Where it did not appear that defendant would be unable to state a defense, his motion for leave to amend, made immediately after rendition of judgment on the pleadings, was improperly denied as coming too late. *Hancock v. Luke*, 26.
6. **RECOUPMENT—ACTION FOR TORT—CLAIM OF GENERAL DAMAGES—SPECIAL DAMAGES.** In an action for personal injury seeking only general damages and making no claim for hospital expenses, etc., paid by defendant, a plea in recoupment, setting up such expenditures as against the amount of recovery, was properly stricken. *Brophy v. Ogden Rapid Transit Co.*, 426.

POLL TAX. See "HIGHWAYS," "STATUTES," "TAXATION."

#### PRINCIPAL AND AGENT.

1. ACTS OF AGENT—REPUDIATION OR RATIFICATION. A principal must at some point of time ascertain whether the business acts of his agent are authorized, and, in case there is neither fraud concealment, nor misrepresentation, and the rights of third persons are involved, must assert his right to repudiate unauthorized acts within a reasonable time or remain silent. *Moran v. Knights of Columbus*, 397.
2. BOND—LIMITATION OF SURETY'S LIABILITY. Although where a bond is given to secure a contract both instruments should be construed together to determine the obligation of the surety, nevertheless such obligation may be specifically defined in the bond itself, regardless of the provisions of the contract secured. *Blyth-Fargo Co. v. Free*, 233.
3. BOND—CONSTRUCTION. Surety company bond securing contract, specifically stating what defaults were secured, *held* to show understanding of parties that only defaults within the express terms of the engagement were secured. *Blyth-Fargo Co. v. Free*, 233.
4. BOND OF SURETY COMPANY—SAME. The bond of a surety company securing performance of contract will be construed to effectuate the intention of the parties, although gratuitous sureties are favorites of the law. *Blyth-Fargo Co. v. Free*, 233

#### PROHIBITION.

NATURE OF REMEDY—STATUTE. Under Comp. Laws 1907, sec. 3654, a justice of the peace seeking by prohibition to restrain county commissioners from acting under Laws 1915, c. 108, which took effect May 11, 1915, could not secure the writ, where the cause was argued May 14, 1915. *Martineau v. Crabbe*, 327.

#### PUBLIC LANDS.

1. GRANTS TO RAILROADS—CONSTRUCTION—"PUBLIC DOMAIN." Under Rev. St. U. S., sec. 2258 (Act Cong. Dec. 15, 1870) granting a railroad right of way, *held*, that land within city limits and not subject to pre-emption rights was "public land" included in the grant. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.
2. PRE-EMPTIONS—CONSTRUCTION. Act Cong. March 3, 1877, *held* a curative act intended to permit pre-emption entries on public lands, though included within the corporate limits of a city or town. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.

#### QUIETING TITLE.

APPEAL—HARMLESS ERROR. Where plaintiff suing to quiet title did not prove any title, error in finding for defendant and in permitting defendant to set up an additional title in a supplemental answer *held* harmless. *Fares v. Urban*, 609.

#### RAILROADS.

1. INJURIES TO PERSONS ON TRACKS—ACTIONS—EVIDENCE. In an action for the death of one run down by cars being switched, evidence *held* to warrant findings that the railroad company

and deceased were both negligent. *Ryan v. Union Pac. R. Co.*, 530.

2. **SAME—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.** In an action for the death of one run down by cars on a switch track, the question of deceased's contributory negligence *held* for the jury. *Ryan v. Union Pac. R. Co.*, 530.
3. **INJURIES TO PERSONS ON SIDINGS—LAST CLEAR CHANCE DOCTRINE—EVIDENCE.** In an action for the running down of plaintiff's intestate on a siding, it being a question for the jury whether his position of peril was discovered, it was proper to submit the last clear chance doctrine. *Ryan v. Union Pac. R. Co.*, 530.
4. **INJURIES TO PERSONS ON TRACKS—LAST CLEAR CHANCE DOCTRINE.** Though the last clear chance doctrine applies where deceased's perilous position should have been discovered, a railroad company is not liable for the running down of plaintiff's intestate, where his own negligence, up to the moment of the accident, concurred in causing the injury. *Ryan v. Union Pac. R. Co.*, 530.

#### RAPE.

**STATUTORY RAPE—"ATTEMPT"—INDICTMENT—STATEMENT OF PARTICULAR ACTS.** In a prosecution for assault upon a female of fifteen with intent to have carnal knowledge, under Comp. Laws 1907, secs. 4221, 4995, indictment *held* not improper as embodying unnecessary allegations calculated to prejudice the jury. *State v. Benson*, 74.

#### RELEASE.

**JOINT DEBTORS—EFFECT.** Ordinarily the discharge of one joint debtor discharges his codebtor. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.

#### SALES.

1. **ACTIONS—WARRANTIES.** Where a contract of sale required notice of breach to be given both to the seller and his agent, failure to give notice to the seller precluded a reliance on the warranty, though notice was given to the agent. *Consolidated Wagon & Machine Co. v. Barben*, 377.
2. **WARRANTIES—ACTION.** Where a contract of sale required machinery found defective to be returned, a failure to return defective machinery precludes reliance on the warranty. *Consolidated Wagon & Machine Co. v. Barben*, 377.

#### SPECIFIC PERFORMANCE.

1. **GROUND OF RELIEF—CONTRACT TO PURCHASE REAL ESTATE.** The holder of an option to purchase real estate cannot, after refusing to purchase at the price stipulated and after sale to another, maintain a bill for cancellation of the deed to such purchaser, and for specific performance. *Cummings v. Nielson*, 294.
2. **EVIDENCE—SUFFICIENCY.** Evidence held insufficient to establish the terms of a parol contract for the sale of land with the clearness and exactness necessary to award specific performance. *Adams v. Manning*, 82.

## STATUTES.

1. CONSTITUTIONAL PROVISIONS—SUBJECT AND TITLE OF ACT. Laws 1915, c. 23, secs. 1-3, regulating hours of work of employees, held to violate the constitutional provision that the subject of an act shall be clearly expressed in its title. *Saville v. Corless*, 495.
2. SPECIAL LEGISLATION—OCCUPATIONS AND EMPLOYMENT. Laws 1915, c. 23, fixing six p. m. as the closing hour for mercantile and commercial houses in cities of 10,000 or more, but exempting drug stores and provision houses, held objectionable as special legislation. *Saville v. Corless*, 495.
3. SUBJECTS AND TITLES—BASTARDY. Laws 1911, c. 62, the title of which is "An act relating to bastardy and providing for security for the support of illegitimate children," does not offend against Consts. art. 6, sec. 23. *State v. Hammond*, 249.
4. SUBJECT-MATTER—ROAD POLL TAX—VALIDITY OF STATUTE. Laws of 1909, c. 118, relating to road poll taxes, including such taxes in cities, held not violative of Const. art. 6, sec. 23, providing that no bill shall contain more than one subject; no new legislation being attempted, the subject-matter of Comp. Laws 1907, secs. 1134-1138, not being incongruous with sections 1743-1751, and it being immaterial that cities were treated in sections 169-313x2. *Salt Lake City v. Wilson*, 60.
5. SAME—AMENDATORY STATUTE. Under Const. art. 6, sec. 23, anything may be incorporated in an amendment to a statute which would have been germane, or would have directly related to, the subject-matter of the original statute, or which could properly have been included therein. *Salt Lake City v. Wilson*, 60.
6. SAME—CONSTRUCTION OF CONSTITUTIONAL PROVISION. Const. art. 6, sec. 23, providing that no bill shall contain more than one subject, should be liberally construed in favor of upholding a law, and be so applied as to effectuate its purpose. *Salt Lake City v. Wilson*, 60.
7. PARTIAL INVALIDITY. Laws 1915, c. 108, amending Comp. Laws 1907, sec. 544, and providing for justices' courts, was not entirely invalid, because a separable section of the act, relating to the jurisdiction of the justices, was violative of Const. art. 8, sec. 21. *Martineau v. Crabbe*, 327.
8. JUSTICE COURTS—CONSTITUTIONALITY—"SUBJECT OF A LAW." Laws 1915, c. 108, amending Comp. Laws 1907, sec. 544, providing for justices' courts in precincts coextensive with cities of the first class, etc., is not violative of Const. art. 6, sec. 23, as relating to more than one subject. *Martineau v. Crabbe*, 327.
9. SPECIAL LAWS—SALARIES OF JUSTICE OF PEACE—"COUNTY OFFICER." Laws 1915, c. 108, amending Comp. Laws 1907, sec. 544, providing for justices' courts in precincts coextensive with cities of the first class and for a salary for the justices instead of compensation by fees, is not violative of Const. art. 6, sec. 26. *Martineau v. Crabbe*, 327.
10. SAME—JUSTICES OF THE PEACE. Laws 1915, c. 108, amending Comp. Laws 1907, sec. 544, providing for justices' courts in precincts coextensive with cities of the first class, and that the



justices must be attorneys at Law, is not totally invalid as violative of Const. art. 6, sec. 26, prohibiting special laws. *Martineau v. Crabbe*, 327.

11. SAME—"DUTY"—JUSTICES OF THE PEACE. Laws 1915, c. 108, amending Comp. Laws 1907, sec. 544, providing for justices' courts in precincts coextensive with cities of the first class, and for a clerk and deputies for such courts, is not violative of Const. art. 6, sec. 26, subd. 4. *Martineau v. Crabbe*, 327.
12. LOCAL OPTION LAW—CONSTITUTIONALITY. Laws 1911, c. 106, the local option statute is not unconstitutional as a general law and not of uniform operation. *State v. Briggs*, 288.

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## STREET RAILROADS.

1. PERSONAL INJURY—QUESTION FOR JURY—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE. In an action for personal injury from a collision with defendant's car, *held*, that plaintiff's contributory negligence and defendant's negligence as the proximate cause of the injury were for the jury. *Gibson v. Utah Light & Traction Co.*, 562.
2. PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE. The same degree of care is not imposed upon a pedestrian, attempting to cross an ordinary street car track, that is imposed on him in attempt-

ing to cross a steam railroad track. *Gibson v. Utah Light & Traction Co.*, 562.

3. **OPERATION—CARE REQUIRED.** While a street railroad has a preferential right of passage along and over its car tracks to which all others must yield, yet the street car operatives and a traveler must reciprocally exercise ordinary care to avoid injury. *Gibson v. Utah Light & Traction Co.*, 562.
4. **CONTRIBUTORY NEGLIGENCE—STOPPING AND LISTENING.** A traveler is not required either to stop and listen, or to specially look for an approaching street car, though bound to exercise ordinary care for his own safety in crossing a street car track. *Gibson v. Utah Light & Traction Co.*, 562.
5. **PERSONAL INJURY—NEGLIGENCE—LAST CLEAR CHANCE.** Where plaintiff crossing defendant's street car track did not exercise the required degree of care, defendant had no right to run him down, if by ordinary care it could have avoided doing so after discovering his inattention or peril. *Gibson v. Utah Light & Traction Co.*, 562.

#### TAXATION. See "MANDAMUS."

1. **TAX DEED—ACTION—BURDEN OF PROOF.** Notwithstanding Comp. Laws 1907, sec. 2629, relating to recitals to be contained in tax deeds, plea of tax title by defendants in an action to quiet title held insufficient. *Bean v. Fairbanks*, 513.
2. **TAX TITLE—ACTION—PLEADING AND REPLY.** In an action to quiet title, where defendants' plea of tax title was imperfect and insufficient, a reply, not particularly averring the grounds on which plaintiff claimed the tax sale and deed to be invalid, held sufficient. *Bean v. Fairbanks*, 513.
3. **TAX DEED—TITLE.** Where property was not assessed to defendant or its predecessor, the real owner, but to one not the owner, a sale for taxes and a tax deed conveyed no title, and were of no binding effect as against real owner. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 203.
4. **POLL TAX—VALIDITY OF STATUTE—UNIFORMITY—LIMITATION.** Laws 1909, c. 118, sec. 6, prescribing an annual road poll tax of \$2 and providing for a regulation of the collection and expenditure thereof by ordinance in cities, held not violative of Const. art. 1, sec. 24, or art. 13, sec. 3 relating to uniformity of taxation. *Salt Lake City v. Wilson*, 60.

#### TENANCY IN COMMON.

1. **RIGHTS OF COTENANTS.** Where some of the owners of a horse agreed to trade it for another, paying boot money, and the seller of the second horse received their interests in the first horse and the boot money, he cannot complain that some of their cotenants would not agree to the transaction. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.
2. **AGENCY.** The mere fact that a number united in purchasing a horse does not render them agents for each other in disposing of the animal. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.
3. **RIGHTS OF COTENANTS.** Where inseparable personal property is held by several persons as joint tenants, the tenant in actual

possession may retain it as against his cotenants. *Rocky Mountain Stud Farm Co. v. Lunt*, 299.

#### TRIAL.

1. INSTRUCTIONS—REFUSAL. The refusal of requests covered by the charge given is not error. *Salt Lake & U. R. Co. v. Butterfield*, 431.
2. INSTRUCTIONS—PROVINCE OF JURY—WEIGHT OF EVIDENCE. As pedestrians and the railroad company, using an industrial switch track, must both use ordinary care, it is for the jury to determine what constitutes such care, in view of the frequency of the use, so a charge fixing care on frequency of use is on the weight of the evidence. *Ryan v. Union Pac. R. Co.*, 530.
3. ARGUMENT OF COUNSEL—MATTERS NOT SUSTAINED BY EVIDENCE. A statement by defendant's counsel in argument that a rock which caused the injury sued for was made to fall from removal of its supports by deceased *held* not improper as not being supported by evidence. *Requa v. Daly-Judge Mining Co.*, 92.
4. CONDUCT OF COUNSEL—REMARKS TO OPPOSING COUNSEL. Statements by defendant's counsel during the noon recess directed to plaintiff's counsel in the hearing of the jury *held* not to constitute improper conduct. *Requa v. Daly-Judge Mining Co.*, 92.
5. REVIEW—HARMLESS ERROR. An erroneous charge *held* harmless in view of the whole charge. *Hunt v. Moran*, 388.
6. INSTRUCTIONS—REFUSAL. The refusal of requests covered by the charge given is not error. *Hunt v. Moran*, 388.

#### WATERS AND WATER COURSES.

IRRIGATION—INJURIES FROM OVERFLOW—DUTY TO REPAIR—SUFFICIENCY OF EVIDENCE. In an action for damages to realty caused by overflow from an irrigation ditch, evidence on the issue whether defendants were under duty to repair such ditch *held* to render nonsuit improper. *Chipman et al. v. American Fork City*, 134.

#### WITNESSES.

1. COMPETENCY—DISCRETION OF COURT. The competency of a child, a girl between seven and eight years old, to testify, is within the discretion of the court. *State v. MacMillan*, 19.
2. CREDIBILITY—CROSS-EXAMINATION—INTEREST. In an action to condemn land for a railroad right of way, cross-examination as to whether a witness had not met with other owners and agreed to demand a certain amount as damages for lands taken *held* admissible as affecting his credibility. *Salt Lake & U. R. Co. v. Abbott*, 500.
3. SAME—EXAMINATION. Questions by plaintiff in condemnation proceedings, claimed to be intended to show bias of defendant's witnesses, *held* not apparently connected with that object, and hence properly excluded. *Salt Lake & U. R. Co. v. Abbott*, 500.
4. IMPEACHMENT—CONTRADICTION. Evidence that a witness had omitted to give certain testimony at a coroner's inquest, and

as to which he had subsequently testified, *held* not improperly admitted in impeachment because no foundation had been laid, where he had been questioned as to the omission. *State v. Benson*, 74.

5. **CROSS-EXAMINATION OF DEFENDANT IN CRIMINAL CASE.** To impeach a witness on the ground of inconsistent statements, foundation must be laid by directing his attention to such statements, with time, place, and circumstances, so that he may explain them. *State v. Benson*, 74.
6. **IMPEACHMENT—INCONSISTENT STATEMENTS—OMISSIONS.** Evidence that a witness had omitted to give certain testimony at a coroner's inquest, and as to which he had subsequently testified, *held* not improperly admitted in impeachment because no foundation had been laid, where he had been questioned as to the omission. *Requa v. Daly-Judge Mining Co.*, 92.
7. **SAME—SAME—FOUNDATION.** To impeach a witness on the ground of inconsistent statements, foundation must be laid by directing his attention to such statements, with time, place, and circumstances, so that he may explain them. *Requa v. Daly-Judge Mining Co.*, 92.
8. **MEMORANDUM—REFRESHING RECOLLECTION.** It was not error to permit a physician to testify to the date of a birth after having refreshed his memory from a memorandum book before called to the stand, instead of referring to the book while testifying. *State v. Hammond*, 249.
9. **TRIAL—CROSS-EXAMINATION.** It is not improper for the court to refuse on cross-examination to permit counsel for the defense to repeat over and over again questions upon subjects which have already been fully developed. *State v. Anselmo*, 137.
10. **SAME—QUESTIONS ON CROSS-EXAMINATION.** Counsel for the state, while entitled to considerable latitude in examining witness for the defense, should not be allowed to propound and repeat improper and unfair questions. *State v. Anselmo*, 137.

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